Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MAMMOET SHIPPING B.V., MODUL CARRIERS A.G. & CO. "TITAN SCAN" SCHIFFARTS K.G., and M/V TITAN SCAN,
Petitioners,

v.

SKY SHIPPING LTD.,
Respondent,

and

ITEL CONTAINER CORPORATION, *et al.*,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, with respect to a bill of lading to which the United States Carriage of Goods by Sea Act ("U.S. COGSA"), 46 U.S.C. 1300, *et seq.*, applies *ex proprio vigore*, the inclusion of a clause providing for "English law to apply" unambiguously evidences the ocean carrier's consent to a liability limit higher than that provided by U.S. COGSA and results in the application of England's Hague-Visby Rules where the clear language of the bill of lading requires the application of Japanese COGSA?

LIST OF PARTIES

The parties to the proceedings below are those set forth in the caption. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, petitioners have no parent or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mammoet Shipping B.V. ("Mammoet"), Modul Carriers A.G. & Co. "Titan Scan" Schiffarts K.G. ("Modul") and the M/V TITAN SCAN respectfully pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding.

OPINIONS AND JUDGMENTS BELOW

The United States Court of Appeals for the Eleventh Circuit entered its order and judgment on May 1, 1990, (App. A & B, *infra*). The opinion of the court of ap-

peals (App. A, *infra*, 1a-13a) is reported at 139 F.3d 1450 (11th Cir. 1998). The order and judgment of the United States District Court for the Southern District of Georgia (App. C & D, *infra*) are reported at 1997 A.M.C. 1568 (S.D. Ga. 1996).

JURISDICTION

The court of appeals entered its judgment on May 1, 1998. (App. B, *infra*, 14a-15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The U.S. COGSA package limitation provides in relevant part as follows:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading . . .
>
> *By agreement* between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed . . . .

46 U.S.C. § 1304(5) (emphasis added).

STATEMENT OF THE CASE

A. Statement Of Proceedings And Disposition In The Courts Below.

On or about January 23, 1992, Itel Container Corporation ("Itel") filed its complaint in the United States District Court for the Southern District of New York against the M/V TITAN SCAN, *in rem*, and against Modul Carriers A.G. & Co. "Titan Scan" Schiffarts K.G.

"(Modul") and Sky Shipping Ltd. p/k/a Candyline Ltd. ("Candyline"), *in personam,* seeking to recover damages associated with the loss of 20 new refrigerated ("reefer" containers and physical damage sustained by 6 other new refrigerated containers. On or about July 8, 1993, Itel filed an amended complaint in the United States District Court for the Southern District of New York, naming as additional defendants Mammoet and Autoridad Portuaria Nacional ("Autoridad").[1] The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1333. By order dated February 4, 1994, the lawsuit was transferred from the United States District Court for the Southern District of New York to the United States District Court for the Southern District of Georgia.

1. ***The first round of summary judgment motions.***

On March 13, 1995, Mammoet[2] filed a motion for partial summary judgment asserting that Itel's cause of action was time-barred as against it or, alternatively, that the package limitation of U.S. COGSA, 46 U.S.C. § 1304(5), limited the liability of Mammoet to a maximum of $500.00 for each damaged or lost container. On May 5, 1995, Candyline filed a motion for partial summary judgment, adopting that portion of Mammoet's motion for summary of judgment which supported the application of the U.S. COGSA package limitation.

On May 5, 1995, Itel filed a memorandum of law in opposition to Mammoet's motion for partial summary judgment. Itel asserted that its cause of action against Mammoet was not time barred and, moreover, the applicable package limitation was the higher limitation of liability of England's Hague-Visby Rules, not the lower lim-

---

[1] Autoridad is a stevedoring company which was never served with process in this lawsuit. As a result, Autoridad was dismissed from the lawsuit pursuant to Fed. R. Civ. P. 4(m). (App. A, *infra,* 3a n.2).

[2] Except as noted specifically otherwise, Mammoet, Modul and the M/V TITAN SCAN may be referred to collectively as Mammoet.

itation of U.S. COGSA. On May 25, 1995, Itel filed its memorandum of law in opposition to Candyline's motion for partial summary judgment. Itel asserted that the package limitation found in England's Hague-Visby Rules governed the contract of carriage between Itel and Candyline, not U.S. COGSA.

By order dated June 30, 1995, the district court denied the defendants' motions for partial summary judgment, concluding that unresolved evidentiary issues existed as to: (1) whether the parties to the respective contracts of carriage clearly agreed to increase the carriers' liability limits beyond that of U.S. COGSA; and (2) the scope of the extension of suit time granted by Candyline to Itel (i.e., whether it included an extension of suit time from Mammoet to Itel).

2. The second round of summary judgment motions.

On December 6, 1995, Mammoet filed its second motion for partial summary judgment, asserting that Itel's cause of action was time-barred as against it or alternatively, that its liability was limited by the package limitation of either the Hague Rules, as enacted in Japan ("Japanese COGSA"), or U.S. COGSA. Itel filed a motion for summary judgment asserting that neither Japanese COGSA nor U.S. COGSA applied to Itel's contract of carriage with Candyline; rather, the contract of carriage was governed by either England's Hague-Visby Rules or, alternatively, the 1924 Hague Convention. Candyline filed a motion for partial summary judgment against Mammoet, asserting that it was entitled to full indemnification, together with all costs and attorneys' fees, for any judgment entered in favor of Itel against it.

By order dated February 15, 1996, the district court ruled on the motions for summary judgment. The district court held as follows: (1) Candyline was entitled to indemnity from Mammoet for any sums adjudged against

it, plus reasonable attorneys' fees, but only up to the maximum liability of Mammoet pursuant to the liability limitation governing the contract of carriage between Candyline and Mammoet; (2) the contract of carriage between Itel and Candyline was governed by England's Hague-Visby Rules; (3) unresolved factual issues precluded the district court from determining which statutory regime governed the contract of carriage between Candyline and Mammoet; and (4) questions of fact remained as to whether Itel's claim against Mammoet was time barred. The district court ruled that the case would "proceed to trial on the remaining issues of liability and the law applicable to the Candyline-Mammoet shipping agreement."

3. ***The district court's order and judgment.***

On September 3, 1996, a one-day bench trial was conducted, during which time the district court heard the deposition and live testimony of various witnesses, reviewed numerous exhibits introduced into evidence by the parties, and heard arguments of counsel. By order dated October 24, 1996, the district court entered its findings of fact and conclusions of law. The district court ruled as follows: (1) Itel's claims against Mammoet are time barred; (2) Candyline breached its contract of carriage with Itel, but Candyline's liability is limited by the package limitation of England's Hague-Visby Rules; (3) Mammoet must indemnify Candyline for any damages Candyline pays Itel, but Mammoet's liability is limited by the package limitation of U.S. COGSA, which governs the contract of carriage between Candyline and Mammoet; and (4) Itel did not prove a deviation from the contract of carriage sufficient to oust the applicable limitations of liability. (App. C, *infra*, 43a).

On February 20, 1997, the district court entered final judgment: (1) against Candyline and in favor of Itel in the amount of $385,136.96, representing $291,509.83,

calculated according to the liability limitation of England's Hague-Visby Rules, plus prejudgment interest in the amount of $93,627.13; and (2) against Mammoet and in favor of Candyline in the amount of $73,145.47, representing $13,000.00, calculated according to the U.S. COGSA package limitation, prejudgment interest in the amount of $4,175.34, and reasonable attorney's fees and costs in the amount of $55,970.13. (App. D, *infra,* 45a-46a).

4. *The appeal to the Eleventh Circuit Court of Appeals.*

Candyline filed its notice of appeal to the court of appeals on March 21, 1997. Appellate jurisdiction was grounded upon 28 U.S.C. § 1291. Neither Itel nor Mammoet appealed from thhe proceedings below. On May 1, 1998, the court of appeals entered its order and judgment affirming in part and reversing in part the district court's order and judgment. The court of appeals affirmed the district court's determination that the Hague-Visby liability limit applies to the Candyline/Itel contract of carriage. The court of appeals reversed the district court's finding that the U.S. COGSA liability limit governs the Mammoet/Candyline contract of carriage. The court held that England's Hague-Visby liability limit also applies to the Mammoet/Candyline contract of carriage. (App. A, *infra,* 13a).

B. Statement Of The Facts.

1. *The Parties.*

Itel is, or was during the relevant time period, a container leasing company with a principal place of doing business in San Francisco, California. Candyline is, or was during the relevant time period, a non-vessel operating common carrier ("NVOCC") with its principal place of business in London, England. Modul is, or was during the relevant time period, a legal entity with an office c/o Mammoet-Hansa Linie A.G. in Bremen, Germany. Modul was the owner of the M/V TITAN SCAN during the

relevant time period. Mammoet is, or was during the relevant time period, a legal entity with its principal place of business in Amsterdam, The Netherlands. Mammoet was the operator of the M/V TITAN SCAN during the relevant time period. The M/V TITAN SCAN is the ocean-going vessel which transported Itel's refrigerated containers from Yokohama, Japan, to Savannah, Georgia.

2. *Negotiation of the contracts of carriage.*

In 1990, Itel purchased 198 new refrigerated containers in Japan for use in international commerce. In August and September of 1990, following the purchase of the containers, Itel made arrangements to have the containers transported from Japan to the United States for distribution to its customers.

a. The Candyline/Itel Booking Note and Bill of Lading.

To negotiate the ocean transportation of the containers Itel retained the services of Roger Cook, a London-based shipbroker engaged in the business of chartering whole vessels or space on vessels to charterers who have the need to hire vessels or space on vessels. Itel had employd Mr. Cook on previous occasions to assist in "repositioning" containers purchased by Itel. Cook was a director at Mercury (London) Limited ("Mercury"), a ship brokerage service located in the Baltic Exchange Chambers in London, England. Mercury was owned by Brown Jenkinson (Chartering) Ltd. ("Brown Jenkinson"), a ship brokerage service also located in London, England. George Connides was an employee of Brown Jenkinson. At all material times, Mercury, Brown Jenkinson, Roger Cook and George Connides acted as Itel's agents.

In August of 1990, Kenneth Hurst, who was stationed in Itel's San Francisco office, held the position of Director of Marketing and Administration for Itel. Ronald Howson was Itel's Vice President for Europe, operating out of Itel's office in the United Kingdom. Lisa Leach

was Itel's Vice President and General Counsel. In negotiating the terms of the ocean carriage of the containers, Mr. Cook dealt "in the main" with Mr. Hurst.

After being retained by Itel, Mr. Cook contacted Jonathan Marks, who shared office space with Mercury Shipping at the Baltic Exchange Chambers, in London, England. Mr. Marks was a director and ship broker at Prochart Services Ltd. ("Prochart"), a ship brokering company. Mr. Marks was also a director at Candyline. At all material times, Prochart acted as the agent for Candyline.

Negotiations between Itel and Candyline for the carriage of the containers were carried out by Mr. Cook, of Brown Jenkinson as agent for Itel, and Mr. Marks, of Prochart as agent for Candyline. After negotiations commenced, Mr. Cook presented Mr. Marks with a "proforma booking note" previously employed by Itel for the carriage of Itel's containers aboard the M/V THALASSINI DOXA. The proforma booking note contained a number of clauses with a line running through them, indicating that all or a portion of clauses 5, 6, 7, and 10 of the proforma booking note had been deleted. This proforma booking note, with deletions, was presented to Mr. Marks for review by Candyline. On or about August 29, 1990, Mr. Cook forwarded a facsimile to Mr. Hurst, of Itel, in which Mr. Cook confirmed that Candyline had reviewed the proforma booking note and had submitted proposed "logical amendments" and "required alterations," including an additional clause 10 requiring that "English law to apply."

After obtaining Mr. Hurst's approval of the amendments and alterations proffered by Candyline, Mr. Cook had his secretary prepare the final draft of the booking note between Candyline and Itel. Candyline and Itel subsequently executed the final draft of the Conline Booking Note dated August 30, 1990 ("Itel/Candyline Booking Note"), for the transportation of Itel's containers from

Yokohama, Japan, to Savannah, Georgia. Itel's final approval of the terms set forth in the Itel/Candyline Booking Note was provided to Mr. Cook by Mr. Hurst from his San Francisco office. Mr. Marks signed the Candyline Booking Note on behalf of Candyline while Mr. Howson signed on behalf of Itel.

The Itel/Candyline Booking Note contains two pages labeled "additional clauses." Clause 10, as set forth in these additional clauses, provides as follows: "English Law to apply." This clause was inserted in the Candyline Booking Note at the request of Candyline. The Candyline Booking Note also contains an addendum, dated August 31, 1990, which altered the discharge port from Jacksonville, Florida, to Savannah, Georgia.

In September of 1990, Aall Barwil Agencies K.K. ("Barwil Japan"), Candyline's agent in Japan, prepared a Liner Bill of Lading ("Itel/Candyline Bill of Lading") which was signed by Yasushi Iwaishi, an employee of Barwil Japan, on behalf of Candyline. The Itel/Candyline Bill of Lading obligated the "carrier" to transport the containers from Yokohama, Japan, to Savannah, Georgia. Itel (Tokyo) is named in the Itel/Candyline Bill of Lading as the "shipper" and Itel (Charleston) is named as the "consignee." The Itel/Candyline Bill of Lading provides as follows: "Terms and Conditions as per Conline Booking Note Dated 30th August 1990." The Itel/Candyline Bill of Lading incorporates the calculation of freight set forth in the Candyline Booking Note. Clause 13 at Page 2 of the Itel/Candyline Booking Note provides as follows: "Freight payable to: Hambros Bank Ltd., 41 Tower Hill, London EC3N 4HA, ..." An "excess value" for the containers was neither declared nor inserted in the Itel/Candyline Bill of Lading, and additional freight was not paid for the shipment of Itel's containers aboard the M/V TITAN SCAN. On or about September 14, 1990, Itel paid the $207,900.00 freight due Candyline to Candyline's bank account at Hambros Bank Ltd., in London, England.

The original Itel/Candyline Bill of Lading was delivered by Barwil Japan to Itel's office in Tokyo, Japan, and was thereafter received by Itel's Charleston office. The original Itel/Candyline Bill of Lading was subsequently surrendered by Itel's Charleston office to Candyline's agent in the United States, Barwil Agencies (Louisiana) Inc. ("Barwil Louisiana"), in consideration for the delivery of the containers to Itel at Savannah.

b. The Candyline/Mammoet Booking Note and Bill of Lading.

During the course of Candyline's negotiations with Itel, Candyline entered into negotiations with Mammoet for the carriage of the containers aboard the M/V TITAN SCAN. Itel and Mammoet had no direct dealings with each other during the time period during which the respective contracts of carriage were negotiated.

The negotiations between Candyline and Mammoet were initiated during a conversation on the floor of the Baltic Exchange between Mr. Marks and Lindsay Adams, the manager of Mammoet's London office. Mammoet's London office was also located in the Baltic Exchange Chambers. Mammoet's London office served as a branch office for Mammoet's principal office in Amsterdam, The Netherlands. Mammoet's London office did not actually draft or negotiate the contracts of carriage, but forwarded all proposed contracts of carriage for review by Mammoet's Amsterdam office.

After Mr. Marks advised Ms. Adams that Prochart had possible cargo business for Mammoet, Ms. Adams telephoned Mammoet's Amsterdam office to determine whether Mammoet had any interest in the cargo. Mammoet's Amsterdam office responded in the affirmative, and negotiations commenced in earnest for the fixture. By telex dated August 28, 1990, Mammoet advised Prochart of its "firm offer" for the carriage of Candyline's containers. In this telex, Mammoet requested that Prochart provide it with background information on Candyline. Mam-

moet sought this information because it had never before contracted with Candyline.

Mr. Marks, by return telex dated August 28, 1990, set forth Candyline's counter-offer to Mammoet's firm offer. Mr. Marks suggested that the freight rate be reduced to $900 per container from the original $1,100 per container rate offered by Mammoet. Mr. Marks also provided background information on Candyline, including Candyline's registered office, bank, and trade references. Prochart and Mammoet continued to exchange telexes refining the major terms of the proposed contract of carriage between Candyline and Mammoet.

On or about August 29, 1990, Mr. Marks provided Mammoet's London office with a copy of a proforma booking note for review. The booking note, as well as one page of additional clauses thereto, consisted of a copy of the proforma booking note from the M/V THALASSINI DOXA which Mr. Cook, on behalf of Itel, had previously provided to Mr. Marks during the negotiation of the Candyline Booking Note. The proforma booking note also consisted of a final page, entitled "Candyline/Titan Scan," setting forth additional alterations in the M/V THALASSINI DOXA proforma booking note. The last sentence of this last page contained the proposed additional clause 10, which provided that "English law to apply." By facsimile dated August 29, 1990, Mammoet's London office forwarded this proforma booking note, and proposed alterations thereto, to Mr. Jaap Slager, the sales manager in the commercial department of Mammoet's Amsterdam office.

In August or September of 1990, Candyline and Mammoet executed a Conline Booking Note dated August 30, 1990 ("Candyline/Mammoet Booking Note"), for the transportation of the 198 containers from Yokohama, Japan, to Savannah, Georgia. The Candyline/Mammoet Booking Note was prepared by Prochart, on behalf of Candyline. In September of 1990, Nedlloyd Lines Agen-

cies K.K. ("Nedlloyd"), as agents for Mammoet in Japan, signed and delivered the original Liner Bill of Lading Number MSBV900200 ("Candyline/Mammoet Bill of Lading") to Barwil Japan, Candyline's agent in Japan. The Candyline/Mammoet Bill of Lading was prepared by Candyline's agent, Barwil Japan, at the request of Mammoet. The Candyline/Mammoet Bill of Lading obligated the "carrier" to transport the containers from Yokohama, Japan, to Savannah, Georgia. Candyline is named in the Candyline/Mammoet Bill of Lading as the "shipper" and Candyline's American agent, Barwil Louisiana, is named as the "consignee." The Candyline/Mammoet Bill of Lading provides as follows: "Terms and Conditions as per Conline Booking Note Dated 30th August 1990." The Candyline/Mammoet Bill of Lading incorporates the calculation of freight set forth in the Candyline/Mammoet Booking Note. Clause 13 at Page 2 of the Candyline/Mammoet Booking Note provides as follows: "Freight payable to: Mammoet Shipping B.V., Bank Account 54.03.75.020 Algemene Bank Nederland, N.V. Amsterdam."

An "excess value" for the containers was neither declared nor inserted in the Candyline/Mammoet Bill of Lading, and additional freight was not paid for the shipment of the containers aboard the M/V TITAN SCAN. On or about September 14, 1990, Candyline paid the $181,046.25 freight due Mammoet to Mammoet's bank account in Amsterdam, The Netherlands.

3. ***The voyage.***

Itel's containers were loaded aboard the M/V TITAN SCAN at Yokohama, Japan, in September of 1990, destined for discharge in Savannah, Georgia. While en route to Savannah, however, the vessel encountered confused seas, with the result that 20 containers were lost overboard and 6 other containers sustained physical damage.

REASONS FOR GRANTING THE PETITION

At the district court level, the question presented by this petition has generated conflicting decisions which continue to proliferate and the need for guidance from this Court is acute. This case presents a timely opportunity to provide that guidance. Moreover, the decision below is erroneous and the issue that it addresses is important.

I. THE COURT OF APPEALS' INTERPRETATION AND APPLICATION OF U.S. COGSA § 1304(5) PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW UPON WHICH DISTRICT COURTS HAVE REACHED CONFLICTING RESULTS, THUS REQUIRING GUIDANCE FROM THIS COURT.

A. Application of U.S. COGSA.

U.S. COGSA "is a comprehensive statute intended to limit the liability of carriers engaged in international shipping." *Unimac Co., Inc. v. C.F. Ocean Serv., Inc.*, 43 F.3d 1434, 1436 (11th Cir. 1995). U.S. COGSA applies *ex proprio vigore* "to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. § 1312. "Foreign trade" is defined as "the transportation of goods between the ports of the United States and ports of foreign countries." *Id.* This is so despite conflicting contract terms or foreign legal systems. "Under U.S. law, [U.S.] COGSA is compulsorily applicable, regardless of any provision to the contrary in the bill of lading or any rule to the contrary under foreign law. The parties do not have the freedom to displace [U.S.] COGSA with another regime . . . ." 2A *Benedict on Admiralty* § 46 at 5-13 (7th ed. 1996); *see also* 2A *Benedict on Admiralty* § 41 at 5-2 (noting that while for most shipments to the United States more than one legal regime will be compulsorily applicable, United States courts are bound to apply U.S. COGSA).

B. Increasing the liability limit "by agreement."

Section 1303(8) of U.S. COGSA prohibits clauses in bills of lading which relieve a carrier from liability for its negligence or fault, or that lessen its liability "otherwise than as provided" in U.S. COGSA. 46 U.S.C. § 1303(8). The U.S. COGSA package limitation, section 1304(5), provides in relevant part as follows:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading . . .
>
> *By agreement* between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed . . . .

46 U.S.C. § 1304(5) (emphasis added).

U.S. COGSA § 1304(5) limits the liability of the carrier to $500 per package or customary freight unit unless (1) the shipper declares the value of the goods and inserts that information in the bill of lading, or (2) the carrier and shipper establish a higher liability limit "[b]y agreement." *Sunds Defibrator, Inc. v. M/V ATLANTIC STAR*, 1986 A.M.C. 368 (S.D.N.Y. 1986). Neither U.S. COGSA nor its legislative history defines the term "agreement." *See* A. Nakazawa and A. Moghaddam, *COGSA and Choice of Foreign Law Clauses in Bills of Lading*, 17 Tul. Mar. L.J. 1, at 4 n.16 (1992). "Black's Law Dictionary defines 'agreement,' . . . as 'the coming together in accord of two minds on a given proposition.' The test, therefore, is whether the parties in fact contemplated and intended a higher limitation of liability to govern their relationship." *Id.*

The analysis of whether such an "agreement" exists must begin with the presumption that where, as here,[3] U.S. COGSA applies *ex proprio vigore* to the bill of lading, then U.S. COGSA governs. If the shipper argues for a higher liability limit than that contained in U.S. COGSA, it must show that the parties agreed to it in the contract of carriage. The effectiveness of a shipper's argument to impose the higher Hague-Visby liability limit generally depends on the clarity with which the clause paramount calls for the application of the Hague-Visby Rules. 2A *Benedict on Admiralty* § 46 at 5-14. If the clause paramount is irretrievably ambiguous the U.S. COGSA liability limit is applied because there is no clear intent to allow a liability limit different than that set by law. *Valmet Materials Handling Equip. Inc. v. Nedlloyd Lijnen B.V. Rotterdam,* 1993 A.M.C. 1243 (M.D. Fla. 1993); *Francosteel Corp. v. M/V KAPETAN ANDREAS G,* 1993 A.M.C. 1924 (S.D.N.Y. 1993).

C. Conflicting decisions of district courts.

The recurring issue presented in the present lawsuit is as follows: in a lawsuit against a carrier for cargo damage, which liability limit applies—the lower U.S. COGSA limit or the more generous Hague-Visby limit? Many district court decisions have addressed this issue, albeit with inconsistent results:

> A line of cases, predominantly from the Southern District of New York, holds that a Clause Paramount in an international bill of lading that expressly mentions both COGSA and the Hague-Visby Rules incorporates Hague-Visby's higher carrier liability limits. The Clauses Paramount discussed in these cases generally maintain that the contract of carriage is controlled by either COGSA or the

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[3] Because this lawsuit involves the shipment of goods from Japan to the United States, U.S. COGSA governs the contracts of carriage *ex proprio vigore.*

> Hague-Visby Rules. However, the two regimes incorporate different levels of package liability limitation, with Hague-Visby allowing the shipper a greater recovery against the carrier. Courts generally hold that COGSA applies ex proprio vigore but sometimes still allow the conflict between COGSA and the Hague-Visby liability limits to be resolved in favor of the shipper by allowing for the higher Hague-Visby recovery. Courts arrive at this conclusion by one of two analytical paths. First, some courts have held that the bill of lading is ambiguous because the Clause Paramount makes reference to Hague-Visby and so it must be construed against the carrier (who is usually the drafter). Other courts have held that because Hague-Visby allows a higher recovery, any reference to Hague-Visby in the bill of lading constitutes the carrier's "agreement" to accept the higher package liability scheme. Neither analysis withstands careful scrutiny.

T. R. Jefferies, *COGSA or Hague-Visby: Cargo Damages in International Shipments,* 18 Hous. J. Int'l L. 767, 769 (1996); *see also* W. Tetley, *Acceptance of Higher Visby Liability Limits by U.S. Courts,* 23 J. Mar. L. & Com. 55 (1992).

District courts, reviewing the express language of similar clauses paramount in the bills of lading before them, have reached conflicting results. *See* Tetley, 23 J. Mar. L. & Com. at 55, 58 (noting that of six opinions from the Southern District of New York addressing this issue, the courts have reached conflicting results, with four decisions applying the higher of liability limit of Hague-Visby and two refusing to do so); *Sunds Defibrator, Inc. v. The Atlantic Star,* 1986 A.M.C. 368 (S.D.N.Y. 1983) (in shipment from Sweden (a Hague-Visby nation) to the United States, the district court, in construing clause paramount providing that the "Hague Rules . . . dated 25th August 1924, and any legislation making those rules compulsorily applicable to this Bill of Lading including

[COGSA] . . .," denied the higher Hague-Visby limit on the basis there was no clear reference to the Hague Visby Rules); *Daval Steel Products v. ACADIA FOREST*, 1988 A.M.C. 1669 (S.D.N.Y. 1988) (in shipment from Belgium to United States, court concluded clause paramount incorporated higher Hague-Visby limitation); *I.N.A. v. The ATLANTIC CORONA*, 704 F. Supp. 528 (S.D.N.Y. 1989) (in construing bill of lading similar to that of *ATLANTIC STAR*, the court held that the higher limitation of Hague-Visby applied); *I.N.A. v. The SEA-LAND DEVELOPER*, 1990 A.M.C. 2967 (S.D.N.Y. 1989) (court denied higher Hague-Visby limitation where bill of lading for shipment from the United Kingdom to the United States referred to "a compulsorily applicable Carriage of Goods by Sea Act, ordinance or statute similar to [the Hague Rules]"); *Francosteel Corp. v. The DEPPE EUROPE*, 1990 A.M.C. 2962 (S.D.N.Y. 1990) (court allowed higher Hague-Visby limitation in shipment from Belgium to Puerto Rico where bill of lading referred to a compulsory carriage of goods by sea act along with the "rules thereto annexed"); *Associated Metals & Minerals Corp. v. The ARKTIS SKY*, 1991 A.M.C. 1499 (S.D.N.Y. 1991) (in shipment from Spain to United States, court allowed higher Hague-Visby limitation where bill of lading provided that the Hague Rules, as enacted in the country of shipment, would apply and that in trades where the Hague-Visby Rules applied compulsorily, "the provision of the respective legislation would be considered incorporated in the bill of lading); *Francosteel Corp. v. M/V KAPETAN ANGREAS G*, 1993 A.M.C. 1924 (S.D.N.Y. 1993) (court found material issues of fact remaining with respect to the parties' intent to apply a higher limitation of liability than that of U.S. COGSA); *Francosteel v. MV/ PAL MARINOS*, 885 F. Supp. 86 (S.D.N.Y. 1995) (in shipment from Belgium to the United States, court found clause paramount ambiguous and therefore, construing

ambiguity against the carrier as drafter of the bill of lading, held that higher Hague-Visby limitation applied).

District courts in other jurisdictions have also reached conflicting results on whether a clause paramount requires application of the higher liability limit provided by the Hague-Visby Rules. *See Rockwell Int'l Corp. v. S/S KOELN EXPRESS*, 1987 A.M.C. 2537 (D. Md. 1987) (in shipment from Germany to the United States, where bill of lading provided for the application of the Hague Rules or the Hague-Visby Rules, whichever was "compulsorily applicable to the contract," the court refused to apply higher Hague-Visby limitation because U.S. COGSA applied *ex proprio vigore*); *Associated Metals & Minerals Corp. v. M/V LUMBE*, 1993 A.M.C. 700 (D.N.J. 1991) (without citation to supporting authority, court held that in shipment from Argentina to the United States, plain language of bill of lading's clause paramount amounted to an agreement to a higher liability limit than that provided by U.S. COGSA); *Ilva U.S.A. v. M/V BOTIC*, 1993 A.M.C. 240 (E.D. Pa. 1992), *aff'd*, 1993 A.M.C. 2445 (3d Cir. 1993 (in shipment from Italy to the United States, court held that Hague-Visby liability limitation applied because clause paramount called for application of laws enacted in country of shipment and here, Italy had enacted Hague-Visby); *Pyropower Corp. v. M/V ALPS MARU*, 1993 A.M.C. 1562 (E.D. Pa. 1993) (in shipment from Korea to United States, court applied U.S. COGSA, albeit by virtue of analysis under Hague-Visby Rules as enacted in The Netherlands); *Associated Metals v. M/V STAR SKARVEN*, 1995 A.M.C. 505 (S.D. Fla. 1994)(relying upon the reasoning of the district courts in *M/V BOTIC* and *ARKTIS SKY*, the court held that because the country of shipment, Finland, had adopted the Hague-Visby Rules, Hague-Visby limitation would apply pursuant to the express language of the clause paramount).

Guidance is required from this Court to permit consistent resolution of the issue of which limitation governs a carrier's liability when U.S. COGSA applies to a bill of lading *ex proprio vigore*. The parties to a bill of lading should be assured of their potential liabilities at the time and place of issuance of the bill of lading. *M/V DEPPE EUROPE*, 1990 A.M.C. at 2964.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS AND DEPARTS FROM THE ACCEPTED AND USUAL MANNER OF RESOLVING THE ISSUE PRESENTED BY THIS CASE.

The district court cases cited above share one common feature: reliance upon the express language of the bill of lading's clause paramount to determine which liability limit governs the bill of lading. The court of appeals in the present matter erred by first recognizing, then disregarding the clear and unambiguous language of the clause paramount in the Candyline/Itel and Mammoet/Candyline contracts of carriage. The court of appeals eschewed the clear language of the clause paramount because clause 10 of the booking notes and bills of lading provides that "English law to apply." The court of appeals reasoned that the application of English law necessarily required the application of England's Hague-Visby Rules and therefore a higher liability limit. The court's analysis is flawed because under English law, a court would be required to rely upon the clear language of the clause paramount which, as conceded by the court of appeals, calls for the application of Japanese COGSA.

A. "English law to apply" does not result in the application of England's Hague-Visby Rules.

Clause 2, the general paramount clause of the Mammoet/Candyline Booking Note and Bill of Lading, provides as follows:

> 2. General Paramount Clause.
>
> The Hague Rules contained in the International Convention for the Unification of certain rules relat-

> ing to Bills of Lading, dated Brussels the 25th of August 1924 *as enacted in the country of shipment shall apply to this contract.* When no such enactment is in force in the country of shipment, the corresponding legislation *of the country of destination shall apply,* but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.
>
> Trades where Hague-Visby Rules apply:
>
> In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968—The Hague-Visby Rules—apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another Carrier, and to deck cargo and live animals.

(App. A, *infra*, 8a (emphasis added)). The court of appeals concluded correctly that "[a]ccording to the first paragraph of the General Paramount Clause, the Hague Rules as enacted by Japan would be incorporated into the Bill of Lading." (App. A, *infra*, 9a). The court of appeals' interpretation of the general paramount clause is supported by other district courts and other circuit courts of appeals addressing the identical clause paramount. *See M/V BOTIC*, 1993 A.M.C. 240 (E.D. Pa. 1992), *aff'd*, 1993 A.M.C. 2445 (3rd Cir. 1993); *M/V ARKTIS SKY*, 1991 A.M.C. 1499 (S.D.N.Y. 1991), *rev'd on other grounds*, 978 F.2d 47 (2d Cir. 1992).

Despite the clear language of the clause paramount, which would result in the application of Japanese COGSA, the court of appeals, citing clauses 3 and 10 of the bill of lading as pointing toward the application of English law, held that the phrase "English law to apply" would result in the application of England's Hague-Visby Rules. In so ruling, the court of appeals failed to

engage in the analysis of whether, under English law, England's Hague-Visby Rules would apply to the Mammoet/Candyline Booking Note and Bill of Lading.

At trial, Mammoet introduced without objection the affidavit of Martin Wisdom, an English solicitor retained by Candyline to address whether the "English law to apply" provision of the respective booking notes and bills of lading results in the compulsory application of England's Hague-Visby Rules. Mr. Wisdom offered his opinion on the following issue: "Whether the English Carriage of Goods by Sea Act 1971 and therefore the Hague-Visby rules are incorporated into the contract by carriage by necessary inference from the fact that the terms of the contract of carriage provide for English law to be applicable." (App. E, *infra*, 48a). Mr. Wisdom, relying upon the English Court of Appeal's decision in *Hellenic Steel Co. & Others v. Svolamar Shipping Co. Ltd. & Others*, 1 Lloyd's Rep. 370 (Ct. App. 1991) (hereinafter referred to as "*the KOMINOS S*"), and upon an authoritative text discussing *the KOMINOS S*, concludes that the "English law to apply" provision of the Mammoet/Candyline Booking Note and Bill of Lading would not be sufficient to result in compulsory application of the England's Hague-Visby Rules. (App. E, *infra*, 56a).

Mr. Wisdom notes that an English court, in determining which version of the Hague Convention would apply, would examine the general paramount clause of the bill of lading which, in the present case, is found at Clause 2 of the Mammoet/Candyline Booking Note and Bill of Lading. Mr. Wisdom's opinion comports with that of the court of appeals in concluding that the clause paramount in the Mammoet/Candyline Booking Note and Bill of Lading would call for the application of Japanese COGSA. (App. A, *infra*, 9a). Mr. Wisdom concludes that "[c]onsequently, . . . an English Court applying English law would be bound to hold that the United

Kingdom Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules are not incorporated into the contract of carriage. (App. E, *infra*, 56a).

Mr. Wisdom's affidavit is reinforced by a decision of the Queen's Bench Division (Commercial Court) which was handed down on June 5, 1997, after the trial in this case, and which was submitted to the court of appeals by Candyline. The decision, *Lauritzen Reefers v. Ocean Reef Transport Ltd.* S.A., 2 Lloyd's Rep. 744 (Q.B. 1997) (hereinafter *"the BUKHTA RUSSKAYA"*), involved the construction of a clause paramount in a charter party which, like that in the present matter, contained the following essential terms: "(1) if the Hague Rules are enacted in the country of shipment, then they apply as enacted; (2) if the Hague Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination applies or, if there is no such legislation, the terms of the Convention containing the Hague Rules apply; (3) if the Hague-Visby Rules are compulsorily applicable into the trade in question, then the legislation enacting those rules applies." *BUKHTA RUSSKAYA*, 2 Lloyd's Rep. at 746; (*see* App. F, *infra*, 113a). Moreover, as with the contract of carriage in the present case, the charter party provided that it was governed by English law. *BUKHTA RUSSKAYA*, 2 Lloyd's Rep. at 745; (App. F, *infra*, 114a).

The charterers argued that England's Hague-Visby Rules applied to the charter party because the charter party provided that it was governed by English law. *BUKHTA RUSSKAYA*, 2 Lloyd's Rep. at 746; (App. F, *infra*, 112a). The charterers reasoned that because English law was the "overriding regime" applicable to the charter party, the Hague-Visby Rules applied as the "relevant overriding regime." *Id.* Justice Thomas rejected the charterers' argument and ruled that, pursuant to the express language of the clause paramount, the Hague Rules, as enacted in the country of shipment (Mauritania) or,

alternatively, the country of destination (Japan), governed. *BUKHTA RUSSKAYA*, 2 Lloyd's Rep. at 747; (App. F, *infra*, 114a). Justice Thomas ruled that the clear language of the clause paramount determined which law was applicable, not the charter party's provision that English law governed. *Id.*

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 97-8278

ITEL CONTAINER CORPORATION,
Plaintiff-Appellee,

v.

M/V "TITRAN SCAN", her engines, boilers, etc.;
MODUL CARRIERS A.G. & Co., TITAN SCAN"
SCHIFFAHRTS K. G.; MAMMOET SHIPPING, B. V.,
Defendants-Cross-claimants-Appellees,

SKY SHIPPING LTD. f.k.a. CANDYLINE LTD.,
Defendant-Cross-claimant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

May 1, 1998

Before COX, DUBINA and BLACK, Circuit Judges.

COX, Circuit Judge:

Sky Shipping Ltd., formerly known as Candyline Ltd. ("Candyline") appeals following the district court's judgment finding the liability limits of the English Hague-

Visby Rules applicable to Candyline's contract of carriage with Itel Container Corporation ("Itel") and the liability limits of the United States Carriage of Goods by Seas Act (U.S.COGSA) applicable to Candyline's contract of carriage with Mammoet Shipping B.V. ("Mammoet"). We affirm in part, reverse in part, and remand.

I. BACKGROUND

Itel is a container leasing company. In 1990, Itel purchased 198 refrigerated containers in Japan for use in international commerce. Subsequently, Itel negotiated with a representative from Candyline for the shipment of the containers from Japan to Savannah, GA. Candyline operates as a non-vessel operating common carrier—an entity that contracts with a shipper as carrier, but then enters into a separate agreement with a vessel owner or charterer for actual carriage of the shipper's cargo. After negotiating the contract, Itel received a signed copy of a Conline Booking Note evidencing the terms and conditions of the shipment. Along with the boilerplate terms, the Booking Note contained an addendum with additional typewritten terms, including Clause 10, which states "English law to apply." Candyline's agent in Japan then prepared and delivered to Itel's Japanese agent a Liner Bill of Lading. The Bill of Lading incorporated by reference the Booking Note, stating "Terms and Conditions as per Conline Booking Note Dated 30th August, 1990." (R.2-46-5, 6 at ¶ 24). The Bill of Lading contained a General Paramount Clause providing for the application of the Hague Rules in some situations and for the incorporation of Hague-Visby Rules in others, where applicable.[1] Clause 3 of the Bill of Lading was a

[1] The Hague Rules arose from the International Convention of 1924 and were ratified in the United States in 1937. The United States Carriage of Goods by Sea Act (U.S.COGSA) represents the domestic enabling of the Hague Rules. The "Protocol to Amend the Hague Rules of 1924," or the Visby Amendments, were drafted in 1968 and were not adopted by the United States. These Amend-

forum selection clause providing for any disputes arising under the Bill of Lading to be decided in the country where the carrier has its principal place of business, under that country's laws. Candyline's principal place of business was in England.

As a non-vessel operating common carrier, Candyline contracted with Mammoet for the actual carriage of the containers. Mammoet managed the M/V TITAN SCAN, which was owned by Modul Carriers A.G. & Co. ("Modul"). Candyline and Mammoet executed a Conline Booking Note and Bill of Lading containing terms identical to those found in the Itel/Candyline agreement with the sole exception of the cost of the freight. The Bill of Lading was issued in Japan, and like the Itel/Candyline Bill of Lading, provided for "Terms and Conditions as per Conline Booking Note Dated 30th August 1990."

The containers were transported from Japan to Panama without incident. In Panama, the ship made an unscheduled stop and the containers were restowed. During the trip from Panama to Savannah, the containers came loose during heavy weather. Twenty were lost overboard and six others severely damaged.

Itel sued the M/V TITAN SCAN, *in rem*, and Candyline, Modul, Mammoet, and Autoridad Portuaria Nacional, *in personam*, seeking to recover damages for the lost and physically damaged containers.[2] Candyline then filed a cross-claim for indemnity against Mammoet. The district court held that Itel was entitled to recover dam-

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ments raised the per package limitation on liability. *See Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 1991 A.M.C. 1499 (S.D.N.Y.1991). During the relevant time period, England had adopted the Visby Amendments, or Hague-Visby Rules, and Japan had not. (R.4-85-17).

[2] Autoridad is a stevedoring company that was never served with process and was therefore dismissed from the lawsuit pursuant to Fed. R.Civ.P. 4(m). Itel's claims against Modul, Mammoet, and the TITAN SCAN are not at issue in this appeal.

ages from Candyline and that Candyline's liability was determined by the Hague-Visby Rules, a statutory regime adopted in England that provides higher liability limits than United States law provides. The district court also held that Candyline was entitled to indemnity from Mammoet, but that Mammoet's liability was limited by the U.S. COGSA. Because the U.S. COGSA contains a lower cap on liabiilty than the Hague-Visby Rules, Candyline was not indemnified the full amount Candyline paid Itel.

II. CONTENTIONS OF THE PARTIES

The parties do not dispute that Candyline breached its contract with Itel and therefore stands liable to Itel, or that Mammoet must indemnify Candyline as limited by the relevant statutory scheme. Rather, Candyline contends that the distirct court erred in concluding that Candyline's liability to Itel was subject to the liability limits of the Hague-Visby Rules as enacted in England, whereas Mammoet's indemnity to Candyline was restricted by the liability limits contained in the U.S. COGSA. Candyline argues that there is no legal basis for distinguishing between the Itel/Candyline and Candyline/Mammoet agreements and that they were intentionally created as "back to back" contracts to be governed in all aspects by the same statutory regime. Candyline also asserts that the district court erred in finding the liability limits contained in the Hague-Visby Rules applicable to the Itel/Candyline contract. Candyline maintains that while the district court correctly found that the parties intended that English law be used to determine the controlling liability scheme for the Itel/Candyline contract, the district court incorrectly concluded that English law calls for the application of the liability limits of the Hague-Visby Rules. Instead, Candyline asserts that under English law, the liability limits of the Japanese COGSA, which did not adopt the Hague-Visby Rules, would apply.

Itel maintains that Candyline's liability under the Itel/Candyline agreement should be governed by the English

Hague-Visby Rules, arguing that Clause 10 of the Booking Note ("English law to apply") and Clause 3 of the Bill of Lading (forum selection clause) mandate the application of English law. Itel also contends that its contract with Candyline falls within the purview of Article X(c) of the Hague-Visby Rules, calling for the application of those rules when the contract contained in or evidenced by the bill of lading so provides.[3]

Because Mammoet was not a party to the Itel/Candyline agreement, it does not address the district court's conclusion that the liability limits of the Hague-Visby Rules apply to that agreement. Instead, Mammoet urges this court to affirm the district court's determination that the Itel/Candyline and Candyline/Mammoet contracts must be construed separately and that the liability limits contained in the U.S. COGSA applies to the Candyline/Mammoet contract. Mammoet notes that Candyline failed to include in the agreement with Mammoet any language suggesting the existence of a "pass through" liability scheme or "back to back" agreement. Further, Mammoet maintains that the Candyline/Mammoet agreement does not evidence a clear intent to abrogate the liability limits of the U.S. COGSA in favor of a higher liability limit.

III. DISCUSSION

U.S. COGSA aplies compulsorily "to all contracts for carriage of goods by sea to or from ports of the United

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[3] Article X of the British Carriage of Goods by Sea Act of 1971 states:

> The provisions of these Rules [Hague-Visby] shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:
>
> (a) the bill of lading is issued in a contracting State, or
>
> (b) the carriage is from a port in a contracting State, or
>
> (c) the contract contained in or evidenced by the bill of lading provides that these Ruules or legislation of any State giving effect to them are to govern the contract.

States in foreign trade." 46 U.S.C.App. § 1312. U.S. COGSA provides that neither the carrier nor the ship are liable "for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." 46 U.S.C.App. § 1304(5). U.S. COGSA permits the parties to agree by contract to a higher liability limit. However, the parties' intent to apply the higher limit must be clear; if the question of whether the parties agreed to a higher liability limit is "irretrievably ambiguous," then U.S. COGSA applies by default. *See Valmet Materials Handling Equip., Inc. v. Nedlloyd Lijnen B.V. Rotterdam,* 1993 A.M.C. 1243, 1246 (M.D.Fla.1993).

The district court concluded that, with respect to the Itel/Candyline contract, the Hague-Visby statutory scheme as enacted in England provided the appropriate cap on Candyline's liability to Itel. In making this determination, the district court considered that (1) the Bill of Lading was issued in Japan; (2) Candyline, the "carrier" for purposes of the transaction, had its principal place of business in England; (3) previous courts had construed the same General Paramount Clause as evidencing an intent to agree to a higher liability limit; and (4) Clause 10 ("English law to apply") incorporated a foreign legal regime with a higher liability limit than that under U.S. COGSA.

With respect to the Candyline/Mammoet contract, the district court rejected Candyline's argument that the two contracts stood "back to back," thereby creating a "pass through" liability scheme. The court then concluded that unlike the Candyline/Itel agreement, the Candyline/Mammoet agreement did not evidence an intent to abrogate the package limitations contained in the U.S. COGSA in favor of a foreign regime with higher liability limits. The court noted that the "carrier" for purposes of the Candyline/Mammoet agreement was Mammoet, whose

principal place of business is Amsterdam. Thus, while the presence of Clause 3 (forum selection clause) in the Itel/Candyline Bill of Lading suggested the application of British law, it did not with respect to the Candyline/Mammoet agreement. The court also noted that the language of Clause 10 of the Booking Note ("English law to apply") is ambiguous and is not, in itself, dispositive of the parties' intent to displace the liability limits of the U.S. COGSA. Accordingly, because Clause 10 called for the application of English law, Clause 2 (General Paramount Clause) pointed in the direction of Japanese COGSA, and Clause 3 (forum selection clause) called for the application of Dutch law, the court held that Candyline failed to meet its burden of proving Mammoet's unqualified assent to a limit above the $500 ceiling. Thus, Mammoet's reimbursement to Candyline for the damages Candyline paid Itel was restricted by the liability limits of the U.S. COGSA.

The district court's findings of fact shall not be set aside unless clearly erroneous. *See Reich v. Dep't of Conservation & Natural Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994). We review the district court's application of law to the facts of the case *de novo*. *See id.* at 1083 (citing *Massaro v. Mainland Section 1 & 2 Civic Ass'n, Inc.*, 3 F.3d 1472, 1475 (11th Cir.1993)).

A. *Are the Itel/Candyline and Candyline/Mammoet Agreements Separate Transactions?*

We agree with the district court's conclusion that the Itel/Candyline and Candyline/Mammoet contracts must be evaluated as two separate transactions. The evidence is undisputed that Itel and Mammoet had no communication during the negotiation of the respective contracts of carriage. Further, while Candyline insists that its intent in structuring the contracts identically was to create a "pass through" system of liability, Candyline failed to include language to that effect in the Candyline/Mammoet agreement. Looking at the language of the contract, we

find no evidence to support Candyline's assertion that the two contracts must be evaluated as a single transaction.

Our analysis does not end, however, with the determination that the contracts must be evaluated separately. The real question we must answer is whether the district court correctly concluded that the differences in the Itel/Candyline contract and the Candyline/Mammoet contract justify the application of different liability limitations.

B. *Do the Liability Limits of the English Hague-Visby Rules Apply to the Itel/Candyline Agreement?*

We first consider whether the district court correctly concluded that Hague-Visby Rules, as enacted in England, govern the amount of Candyline's liability to Itel pursuant to the Itel/Candyline contract. Relevant to our determination is Clause 2 of that contract, the General Paramount Clause, which provides:

> The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading . . . as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect to shipments to which no such enactments are compulsorily applicable the terms of the said Convention shall apply.
>
> *Trades where Hague-Visby Rules apply.*
>
> In trades where . . . the Hague-Visby Rules [ ] apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in charge of another Carrier, and to deck cargo and live animals.

Also relevant to our determination is Clause 3 of the Bill of Lading, which provides:

> Any dispute arising under the Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the laws of such country shall apply except as provided elsewhere herein.

The district court noted that in the past, General Paramount Clauses identical to this one have been interpreted as an agreement between the parties to have a liability limit higher than that provided under U.S. COGSA. *See Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 1991 A.M.C. 1499 (S.D.N.Y.1991); *Pyropower Corp. v. M/V ALPS MARU*, 1993 A.M.C. 1562 (E.D. Pa.1993). However, while it is true that in those cases, the General Paramount Clause was interpreted to allow for a higher limit of liability, those cases stand for the proposition that where the Hague-Visby Rules were enacted in the country of shipment, the second paragraph of the General Paramount Clause is implicated and the Hague-Visby Rules are therefore incorporated into the Bill of Lading. In this case, the country of shipment was Japan, which had not enacted the Hague-Visby Rules at the time of the contract. Thus, the second paragraph of the General Paramount Clause is not implicated. According to the first paragraph of the General Paramount Clause, the Hague Rules as enacted by Japan would be incorporated into the Bill of Lading.

While the General Paramount Clause suggests the application of Japanese COGSA, we nonetheless agree with the district court's conclusion that the liability limits of the Hague-Visby Rules, as enacted in England, apply to the Itel/Candyline agreement. First, Clause 3 in the Bill of Lading (forum selection clause) states that any dispute arising under the Bill of Lading shall be decided in the country of the carrier's place of business. The "carrier" for purposes of the Itel/Candyline agreement is

Candyline, whose principal place of business is London. Thus, Clause 3 points toward the application of English law. Second, Clause 10 ("English law to apply"), which is contained in the typewritten addendum to the Booking Note, calls for the application of English law.

Until recently, forum selection clauses such as these were unenforceable as a violation of U.S. COGSA. Recently, however, the Supreme Court overruled the line of cases invalidating forum selection clauses in COGSA cases, holding that U.S. COGSA does not nullify foreign arbitration clauses contained in maritime bills of lading. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 535-36, 115 S.Ct. 2322, 2327-28, 132 L.Ed.2d 462 (1995). In *Sky Reefer*, the Court upheld a foreign arbitration clause against a challenge that the clause violated section 3(8)[4] of U.S. COGSA by making recovery under U.S. COGSA more difficult. *See id.* at 531-32, 115 S.Ct. at 2324-26. At least one court has upheld a foreign forum selection clause based on the Court's analysis in *Sky Reefer*, noting that such clauses are enforceable unless the substantive law the foreign forum would apply is less than what COGSA guarantees. *See Blaise G.A. Pasztory v. Croatia Line*, 918 F.Supp. 961, 965 (E.D.Va.1996). Here, the foreign forum selection clauses call for the application of English law which, under the Hague-Visby Rules, contains a higher liability limit than that under U.S. COGSA. Thus, under a *Sky Reefer*-type analysis, the forum selection clause should be enforced.

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[4] Section 3(8) of U.S. COGSA provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connecction with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

46 U.S.C.App. § 1303(8).

Furthermore, under generally accepted principles of contract construction, specific clauses take precedence over general ones, and clauses that have been added by the parties preempt form provisions. See, *e.g.*, *Insurance Co. of N. Am. v. S/S SEALAND DEVELOPER*, 1990 A.M.C. 2967, 2970 & n. 4 (S.D.N.Y.1989). Clause 10 of the addendum to the Booking Note is a specific clause that was added by the parties and therefore should preempt the boilerplate clause paramount. Additionally, while Clause 3 of the Bill of Lading was not added by the parties, it is more specific than the General Paramount Clause, and it, too calls for the application of English law.

As to Candyline's argument that under English law, the liability scheme contained in the Japanese COGSA, rather than that of the English Hague-Visby Rules, would apply, we agree with the district court that the language of Clause 10 ("English law to apply") together with that of Clause 3 (forum selection clause) satisfies Article X(c) of the Hague-Visby Rules, which provides that the Hague-Visby Rules apply if "the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract."

C. *Do the Liability Limits of the U.S. COGSA Apply to the Candyline/Mammoet Agreement?*

We turn now to the question of whether the Candyline/Mammoet agreement evidences a clear intent to abrogate the liability limits of the U.S. COGSA in favor of higher liability limits contained in a foreign statutory regime. As the district court noted, the Candyline/Mammoet contract and the Itel/Candyline contract are nearly identical. However, the district court concluded that unlike the Itel/Candyline agreement, the Candyline/Mammoet agreement did not evidence an intent to overcome the congressional mandate that the liability limits of the U.S. COGSA apply in the absence of a clear agreement to

apply a higher liability limit. We disagree. While the Candyline/Mammoet situation is marginally different from the Itel/Candyline situation, we do not think the differences between the two situations constitute adequate grounds upon which to distinguish the statutory schemes applicable to the liability limits of the respective contracts. The factors that counseled in favor of our applying the higher liability limits of the English Hague-Visby Rules to the Itel/Candyline contract are present in the Candyline/Mammoet contract, as well.

As with the Itel/Candyline contract, the Bill of Lading was issued in Japan, and the country of shipment was Japan; both of these facts suggest, as they did in the Itel/Candyline contract, the application of the Japanese COGSA liability scheme, which does not include the Hague-Visby Rules. However, the Candyline/Mammoet agreement, like the Itel/Candyline agreement, also contains Clause 10, the typewritten term added by the parties stating "English law to apply." Therefore, the only ground for distinguishing between the Itel/Candyline situation and the Candyline/Mammoet situation is Clause 3 (forum selection clause), which provides for the application of the law of the carrier's principal place of business. The "carrier" for the purposes of the Candyline/Mammoet agreement was Mammoet, whose principal place of business is Amsterdam rather than London. Thus, Clause 3 calls for the application of Dutch law. Clause 3, however, is an inadequate ground upon which to distinguish the Itel/Candyline contract from the Candyline/Mammoet contract, for two reasons. First, Clause 3 specifies that "[a]ny dispute . . . shall be decided in the country where the carrier has his principal place of business, and the laws of such country shall apply except as provided elsewhere herein." (emphasis added). Clause 10, a typewritten phrase added by the parties, specifically provided for the application of English law. Second, even if Clause 10 were eliminated, the Netherlands, like England, has adopted the Hague-Visby Rules. Thus, even if the lia-

bility limits of the contract were governed by Dutch law, the higher liability limits contained in the Hague-Visby Rules would nevertheless apply. *See* 6 Benedict on Admiralty 1-30 (Frank L. Wiswall ed., 1998). We therefor conclude that Clause 3 is not an appropriate ground upon which to distinguish the Itel/Candyline agreement from the Candyline/Mammoet agreement. If anything, Clause 3 evidences an intent to abrogate the liability limits of the U.S. COGSA in favor of a foreign statutory scheme with higher liability limits.

IV. CONCLUSION

For these reasons, we affirm the district court's determination that the amount of liability under the Itel/Candyline contract is governed by the English Hague-Visby Rules and reverse the district court's conclusion that amount of indemnity under the Candyline/Mammoet agreement is subject to the U.S. COGSA. We remand for the district court to determine the amount of indemnification to which Candyline is entitled pursuant to the English Hague-Visby Rules.

AFFIRMED in part, REVERSED in part and REMANDED.

APPENDIX B

[Filed May 1, 1998]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8278

District Court No. 4:94-CV-55

ITEL CONTAINER CORPORATION,
Plaintiff-Appellee,

versus

M/V "TITAN SCAN", her engines, boilers, etc.;
MODUL CARRIERS A. G. & CO. "TITAN SCAN"
SCHIFFAHRTS K. G.; MAMMOET SHIPPING, B.V.,
Defendants-Cross-claimants-Appellees,

SKY SHIPPING LTD. f.k.a. CANDYLINES LTD.,
Defendant-Cross-claimant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

Before COX, DUBINA and BLACK, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and REVERSED in part; and that this cause be and the same is hereby REMANDED to said District Court with instructions in accordance with the opinion of this Court;

It is further ordered that defendants-cross-claimants-appellees, Mammoet Shipping pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 1, 1998
For the Court:
THOMAS K. KAHN
Deputy Clerk

By: /s/ Matt Davidson
Deputy Clerk

Issued as Mandate: Jun. 2, 1998

APPENDIX C

[Filed Oct. 24, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civ. No. 494-55

ITEL CONTAINER CORPORATION,
Plaintiff,

v.

M/V TITAN SCAN, her engines, boilers, etc., MODUL CARRIERS A.G. & CO. "TITAN SCAN" SCHIFFAHRTS K.G., CANDYLINE LTD., MAMMOET SHIPPING B.V. and AUTORIDAD PORTUARIA NACIONAL,[1]
Defendants.

ORDER

Following the 9/3/96 trial of this admiralty case, the Court now makes its findings of fact and conclusions of law. The complexity of the matter, however, warrants a brief summary of the Court's determinations.

In 1990, Plaintiff Itel Container Corporation ("Itel") purchased 198 refrigerated containers ("reefers") and arranged to have them transported from Japan to Savannah, Georgia. To this end, Itel contracted with Defendant Candyline Ltd. ("Candyline"), which in turn contracted with Defendant Mammoet Shipping B.V. ("Mammoet") for actual carriage of the containers. Each agreement was evidenced by a bill of lading. Once it struck its deal with

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[1] Evidently never having been served by Itel, Autoridad Nacional Portuaria is now dropped from the action. F. R. Civ. P. 4(m). All future filings shall reflect a properly revised caption.

Itel, Candyline quickly executed a nearly identical agreement with Mommoet, using its contract with Itel as a model.

Mammoet managed the vessel TITAN SCAN, which was owned by Defendant Modul Carriers A.G. & Co. ("Modul"). The TITAN SCAN carried the reefers without incident to Balboa, Panama, at which time it made an unscheduled stop and restowed the cargo. As the vessel journeyed from Balboa to Savannah, twenty containers were lost overboard and six others severely damaged. As a result, Itel brought suit against Candyline, alleging *inter alia*, that Candyline was liable for Mammoet's reckless conduct in restowing cargo without authorization.

Itel also asserted claims directly against Mammoet, Modul, and the TITAN SCAN. These claims, however, are untimely and thus barred. Not only did Itel fail to bring its action within the one-year limitations period, but it made an insufficient showing that these Defendants consented to extend the time for suit.

Nevertheless, because Candyline breached its contract of carriage, Itel can recover damages and prejudgment interest from Candyline. Those damages, however, are limited by the Hague-Visby rules, which govern the Itel-Candyline accord. Although Itel argued that the Hague-Visby limits are inapplicable in light of Mammoet's alleged recklessness, the Court finds Mammoet at most acted negligently.

Candyline, in turn, is entitled to partial indemnity from Mammoet for damages it pays to Itel. While Candyline argued that all liability should fully "pass through" to Mammoet, Candyline's recovery is cabined by the lower liability limitations of the United States Carriage of Goods by Sea Act ("U.S. COGSA"). That statutory scheme applies compulsorily "to all contracts for carriage of goods by sea to or from ports of the United States in foreign

trade." Influenced by a variety of factors, the Court finds Mammoet did not assent to the application of a scheme (such as Hague-Visby) providing higher liability limits than those prescribed by U.S. COGSA. Finally, Mammoet must reimburse Candyline for attorney's fees and expenses incurred in defense of Itel's action.

I. *Background*

Plaintiff Itel is a container leasing company. Stipulated Facts ("Facts") ¶ 1. In 1990, it bought 198 new refrigerated containers in Japan for use in international commerce at a cost of $23,883 apiece.[2] Transcript ("Tr.") at 8; Facts ¶ 1. Following the purchase, Itel arranged to have the containers shipped from Japan to the United States for distribution to its customers. Facts ¶¶ 1, 51. Seeking ocean transport, Itel's employees in San Francisco and London negotiated with Brown Jenkinson, Ltd., a London-based charterer representing Defendant Candyline in this transaction. Facts ¶¶ 2, 4, 5, 7-13. Candyline acted as a non-vessel operating common carrier ("NVOCC")—an entity that contracts with a shipper as carrier, but then enters into a separate agreement with a vessel owner or charterer for actual carriage of the shipper's cargo. Tr. at 28, 35, 43.

Itel personnel negotiated the terms of the carriage contract with Candyline by telephone, telex and facsimile. The parties first evidenced their agreement with a Conline Booking Note containing boilerplate terms. Facts ¶ 19, 20; 6/30/95 Order at 3, 15-16. Itel proposed various alterations to which Candyline agreed. Facts ¶ 22. The parties thus struck preprinted Clauses 5 (in part), 6, 7, and 10 and replaced them with new provisions detailed in an addendum. Tr. at 54-66. Fearful that an American court or arbitrator would imply unintended terms to the

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[2] Each empty container had a size of 40′ × 9′6″ × 8′. Together, all 198 reefers weighed 855,360 kilograms.

Itel-Candyline contract of carriage, at Candyline's behest Clause 10 came to read, "English law to apply." Tr. at 49-50; Facts ¶ 20.

Significantly, the parties left untouched Clauses 2 ("General Paramount Clause"), 3 ("Jurisdiction"), 9 ("Live Animals and Deck Cargo"), 19 ("Optional Stowage") and Additional Clause B. ("U.S. Trade, Period of Responsibility")—provisions pertaining in some way to statutory schemes limiting a carrier's liability to a shipper. Tr. at 66, 68-70; Facts ¶ 31. On 8/30/90, Itel and Candyline executed the final version of the booking note in London, with director Jonathan Marks signing on the latter's behalf. Facts ¶ 20; Tr. at 28.

On 9/8/90, Candyline's agent in Japan, A.A. Barwil Agencies K.K. ("Barwil"). signed a bill of lading and delivered it thereafter to Itel's agent in Japan. Facts ¶24. The bill of lading superseded and incorporated by reference the Conline booking note: "Terms and Conditions as per Conline Booking Note Dated 30th August, 1990." Facts ¶ 26. The document obligated Candyline to transport the containers from Yokohama, Japan to Savannah, Georgia. Pursuant to the freight provision, Itel paid $207,900 ($1,050 per unit) to Candyline about one week later. Facts ¶¶ 35, 36. Itel neither declared an "excess value" for the containers nor paid additional freight for the shipment of such items. Facts ¶ 34.

As an NVOCC, Candyline negotiated with Defendant Mammoet to ship the containers. At the same time, Candyline also conducted discussions with Itel. Tr. at 52-53. Mammoet, an entity with its principal place of business in the Netherlands, managed the M/V TITAN SCAN, a vessel owned by Defendant Modul. Facts ¶¶ 16, 17. Mr. Marks, trying to "turn contracts in the market," Tr. at 43, did not inform Mammoet of Itel's identity, Tr. at 72, but he testified that Mammoet knew full well that Candyline did not own the containers to be transported. Tr. at 22, 41.

Mr. Marks' "fundamental intent" regarding any agreement with Mammoet was its "back-to-back" or "pass through" nature. Tr. at 35-36, 205-06. As a fledging company. Candyline could ill-afford to strike any deal where Mammoet as carrier did not absorb all potential liability Candyline might incur on its contract with Itel; thus, Candyline aimed to guarantee that any liability would "pass through" Candyline to Mammoet. Tr. at 35, 39. To this end, Mr. Marks sought a Candyline-Mammoet contract to mirror the Candyline-Itel contract to the letter, so that the two would stand "back to back." Tr. at 35, 52-53. In hammering out the agreement's terms, Mr. Marks dealt extensively with Brian Carroll and Lindsay Adams, two agents in Mammoet's London office. Tr. at 40.

Mr. Marks insists Mr. Carroll understood and acceded to the "pass through" feature as the cornerstone of any agreement. Tr. at 45-46; *cf.* 151, 162. On 8/28/90, Mammoet made Candyline a "firm offer" of carriage. Tr. at 47, 151. Two days later, the parties executed in London a boilerplate Conline booking note prepared, in essence, by Candyline. Tr. at 64; Facts ¶¶ 37, 38.

In order to ensure a "pass through," Mr. Marks used the Itel-Candyline booking note as a model: he canceled the same preprinted terms Itel had previously stricken and appended "additional clauses" identical to those found in the Itel-Candyline addendum. Tr. at 64-66, 181-82. Clauses 2, 3, 9, 19 and Additional Clause B remained undisturbed, while Clause 10 again provided "English law to apply." To Lindsay Adams, Mammoet's agent in London, "[Clause 10] was a typical insertion" in "the UK markets." Tr. at 64-66, 68, 174, 184-85; Facts ¶ 46. Only the rate of freight varied from the Candyline-Itel contract,[3] Tr. at 49, and Candyline neither declared an

[3] Mammoet collected $950 per unit, so that Candyline made a $100 profit on each container shipped once it paid freight to Mammoet approximately two weeks later. Tr. at 49, 73; Facts ¶¶ 33, 47.

"excess value" for the containers nor paid additional freight for their shipment. Facts ¶¶ 47, 48.

More importantly, Candyline failed to include any declaration of its "pass through" intent in writing to Mammoet. Tr. 71, 189, 207, 209. At trial, Candyline suggested that the 1993 detonation of an IRA bomb at Candyline's offices destroyed any documentation it had detailing the pertinent Candyline-Mammoet negotiations. Tr. 30, 207-08. Mr. Marks readily admitted, however, that Candyline never had discussions with Mammoet concerning a liability scheme; he believed any such action would be superfluous in light of the "back-to-back" nature of the contracts. Tr. 55, 73-74, 188-89, 198, 206.[4] Moreover, Mammoet could produce no records reflecting Mr. Marks' intent. Tr. 71, 207, 209.

On 9/8/90, Nedlloyd Lines Agencies K.K. ("Nedlloyd"), as agents of Mammoet in Japan, signed the Candyline-Mammoet bill of lading and delivered the original to Barwil, Candyline's agent. Facts ¶ 39. Candyline drafted the document at Mammoet's request, and just like its Candyline-Itel counterpart, it provides "Terms and Conditions as per Conline Booking Note Dated 30th August, 1990." Tr. at 66-67; Facts ¶¶ 39, 40.

At the beginnig of September 1990, the TITAN SCAN loaded general cargo at Hatachi, Japan that was destined for discharge at Puerto Moin, Costa Rica. Tr. at 112-13, 140. A few days later, Itel's containers, then in good condition, were loaded in Yokohama onto the ship's eight on-deck bays and into holds below. Tr. at 115, 121; Facts ¶ 51. Itel asserted at trial that port regulations in Yokohama limited the stacking of reefers to four in height,[5]

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[4] Nevertheless, Mr. Marks still secured insurance to cover the voyage of Itel's containers across the Pacific and beyond. Tr. 71.

[5] However, as aptly noted by counsel for Mammoet and Modul, Tr. at 219, Itel made no proffer of evidence to elucidate the substance of these port restrictions beyond merely referencing them,

Tr. at 114, 129, 139, 195-96, and further submitted the vessel's Container Stowage Plan as proof that cargo this size could not be stacked any higher than four.[6] In accordance with these specifications, the containers stood in tiers of three, two, four, four, four, four, three, and three in each of the eight bays when the TITAN SCAN departed Yokohama on 9/9/90. Tr. at 117.

The voyage en route to Puerto Moin and Savannah was uneventful until the TITAN SCAN unexpectedly stopped in Balboa, Panama; the vessel's chief officer, Reinhard Juttner, called on that port in compliance with orders received from Mammoet. Tr. at 121, 142; Facts ¶ 54. Under the guidance and supervision of the ship's personnel, stevedores there restowed the Itel cargo located in bays one and two in order to create sufficient space to allow for the discharge in Puerto Moin of other cargo stowed below deck. Tr. at 86-87, 121, 141. After the reconfiguration, the first two bays held no containers, whereas the fourth, fifth and eighth bays now stacked Itel's cargo in tiers of five. Tr. at 79, 86-89, 124-25; Facts ¶ 54.

Although Mr. Juttner testified that no restrictions prevented the restowing of containers five high, Tr. at 126,

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Pl's Exh. 4; Tr. at 142, 195-96, and any judicial notice by this Court of Japanese law would be inappropriate. *International Trading Co. v. M/V ZENIT SUN*, 684 F. Supp. 861, 864 (E.D.Pa. 1988) ("No proof having been presented at trial as to Chilean law, the court cannot take judicial notice of the law of Chile"). In any event, Itel failed to prove how Yokohama port regulations govern a carrier's conduct once the vessel is in the Caribbean.

[6] Itel's own witness, a marine surveyor with the Maritime Bureau named John Peck, conceded on cross-examination that the Container Stowage Plan is merely a *guideline* for the transport of *loaded* containers. Here, by contrast, Itel's containers were empty. Tr. at 92-93; 114, 137-38. As a consequence, Itel's contention that violation of the Plan constituted reckless conduct on the part of Mammoet and the crew of the TITAN SCAN is accorded little weight. *See infra* at 9-10, 26-28.

129, Mr. Marks swore under oath that (i) Mammoet failed to inform Candyline either before or during the transport that restowing would be necessary or that the TITAN SCAN would anchor in Balboa, Tr. at 22, 76; (ii) he expected Itel's cargo would "not be touched" once loaded in Japan, Tr. at 22; (iii) industry practice forbids the restowing of cargo without permission, Tr. at 23; and (iv) had Mammoet sought permission, Candyline would likely have asked Itel "out of prudence," and recommended "no objection" on the condition that a Candyline-appointed surveyor supervise the stevedores. Tr. at 23-24.

The vessel proceeded and discharged its cargo without incident in Puerto Moin, but while in transit to Savannah, twenty containers from bay five were lost overboard and six others damaged in the early morning hours of 10/11/90. Tr. at 11-12, 88, 230; Facts ¶ 55. Itel charged that the containers were inadequately secured as a result of restowing in Balboa: rather than unitizing the first and second tiers of containers with twistlocks, as the Container Stowage Plan provides, the stevedores and TITAN SCAN personnel utilized double stacking cones, a device which cannot bind one container to another as tightly as the twistlocks. Tr. at 79-80, 89-90. Furthermore, Itel argued that (i) the TITAN SCAN's structural design hindered proper fastening of the containers, since the bays themselves afforded inadequate room for the use of criss-cross lashing, instead of the less effective vertical lashing that was used, Tr. at 82-85, 103-04, 134; and (ii) stacking reefers five high, above the ship's center of gravity and in contravention of Yokohama's port regulations, created a situation that significantly increased the possibility of container loss or damage. Taken together, Itel contended that numerous deviations from proper containerization constituted recklessness and not simply negligence on the part of Candyline and Mammoet. Tr. 211-215.

Mammoet did not dispute the harm that befell Itel's cargo on the way from Puerto Moin to Savannah, Facts

¶ 55, but responded by noting that the unitization and lashing in the other bays remained intact and the rest of the cargo—nearly ninety percent—arrived in good condition in Savannah on October 13, 1990. Tr. at 131. John Peck, presented by Itel as an expert in maritime containerization, concurred with Mammoet's assessment that the twenty containers went overboard when the adjustable bridge fittings, ordinarily used to secure columns of containers to one another, Tr. at 90, 120, opened for reasons unknown. Tr. at 104. This destabilized the stow so drastically that something as minor as the vessel's normal vibrations could then have caused the cargo to jolt, hastening the loss of the reefers. Tr. at 94-95.

At trial, Itel claimed damages of $477,660 for the twenty lost containers, $54,253.75 for the six damaged reefers, and $97,797.04 for costs incurred in locating and removing containers from the waters of the Caribbean,[7] for a total of $623,710.79. Although Itel sued Candyline claiming breach of the contract of carriage, Candyline, in turn, attempted to deflect liability onto Mammoet, alleging that because Mammoet assented to "back-to-back" contracts, Candyline was entitled to *full* indemnification for any payments made to Itel. In addition, Itel sued the TITAN SCAN *in rem* and Mammoet and Modul in tort, alleging a bailment theory.

II. Governing Standards

A. Breach and Indemnity

Because courts have not hesitated to hold NVOCCs liable for cargo loss or damage, Candyline stands liable to Itel if the contract of carriage is found to be breached. *See, e.g., Antilles Ins. Co. v. Transconex, Inc.*, 862 F.2d 391-92 (1st Cir. 1988) (holding NVOCC liable for cargo

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[7] An Itel employee, Lisa Leach, testified about only $60,997.04 of these expenses, but Defendants did not dispute the paperwork Itel offered into evidence detailing $91,797.04 worth of damages.

damage); *Polyplastics, Inc. v. Transconex, Inc.*, 827 F.2d 859, 860 (1st Cir. 1987) ("Vis-a-vis the owner, the [NVOCC] retains primary responsibility for carriage of the goods from origin to destination."); 6/30/95 Order at 11. Nonetheless, this Court has already held that Candyline is entitled to indemnity from Mammoet for claims recoverable against Candyline by Itel. 2/15/96 Order at 4; *Insurance Co. of N. America v. M/V OCEAN LYNX*, 901 F.2d 934, 941 (11th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).

B. Time Bar Issues

Itel's independent claims against Mammoet, Modul, and the TITAN SCAN encounter insurmountable obstacles. Ordinarily, Itel could sue Mammoet in contract for damage and loss to cargo, because "where an agent [Candyline] contracts with a third party [Mammoet] on behalf of a partially disclosed principal [Itel], the third party is liable to such principal as if the parties had contracted directly." *Orion Ins. Co. v. M/V HUMACAO*, 1994 A.M.C. 1922, 1924 n.5, 851 F. Supp. 575 (S.D.N.Y. 1994); 6/30/95 Order at 11-12. Moreover, by its very terms the Candyline-Mammoet bill of lading binds the carrier and the "Merchant," which is defined broadly in the bill to include "the Owner of the cargo." 6/30/95 Order at 11. *See also All Pacific Trading, Inc. v. M/V HANJIN YOSU*, 7 F.3d 1427, 1432 (9th Cir. 1993), *cert. denied sub nom. Hanjin Container Lines, Inc. v. Tokio Fire & Marine Ins. Co., Ltd.*, 114 S.Ct. 1301 (1994) (finding privity of contract between shipper and actual carrier based on broad definition of "Merchant" in bill of lading, despite presence of NVOCC).

At earlier stages in these proceedings, however, Mammoet and Modul asserted a statute of limitations defense against Itel. At that time, all parties agreed that, under any of the possible statutory regimes limiting a carrier's liability—U.S. COGSA, Japan's International Carriage of

Goods by Sea Act ("Japanese COGSA"), or the British Carriage of Goods by Sea Act ("Hague-Visby")—the applicable limitations period is one year. U.S. COGSA—which, as will be seen, governs Mammoet's obligations—discharges the carrier and the ship "from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or date when the goods should have been delivered[.]" 46 U.S.C. § 1303(6). When this strictly enforced statute of limitations accrues, *Unilever Ltd. v. M/T STOLT BOEL*, 77 F.R.D. 384, 386 (S.D.N.Y. 1977), the time-bar effectively extinguishes not just the remedy, but the cause of action itself. *American Hoesch, Inc. v. Steamship Aubade*, 316 F. Supp. 1193, 1194 (D.S.C. 1970); 129 ALR Fed 273, 289 (1996).

While U.S. COGSA typically limits liability arising from contract, § 1303(6)'s plain language does not preclude its application to claims sounding in tort. *Commercial Sheetmetal Co., Inc. v. Matson Navigation Co.*, 711 P.2d 738, 740 (Haw. Ct. App. 1986) ("COGSA § 1303(6)'s suit deadline applies to 'all liability.' That phrase encompasses both contract and tort liability."); *Barretto Peat, Inc. v. Luis Ayala Sucrs., Inc.*, 896 F.2d 656, 661 (1st Cir. 1990) COGSA's one-year statute of limitations applies to torts); *Reisman v. Medafrica Iines, U.S.A.*, 592 F. Supp. 50, 52 (S.D.N.Y. 1984) (COGSA's statute of limitations bars shipper's claims for breach of contract and negligence).[8]

It is undisputed that Itel filed its Complaint on 12/26/91, one year and two months after the TITAN

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[8] *See also St. Paul Fire and Marine Ins. Co. v. Marine Transportation Svcs. Sea-Barge Grp.*, 727 F. Supp. 1438, 1442 (S.D.Fla. 1989) ("COGSA provides an exclusive remedy, barring all other theories of liability, including theories of bailment and negligence"); *Miller Export Corp. v. Hellenic Lines, Ltd.*, 534 F. Supp. 707, 710-11 (S.D.N.Y. 1982) ("exclusive application of COGSA cannot be avoided by couching claims in terms of negligence or other common law causes of actions . . .").

SCAN discharged Itel's reefers in Savannah. 6/30/95 Order at 6; Facts ¶ 57. At first blush, Itel failed to meet U.S. COGSA's limitations period; in fact, Candyline granted a six-month extension of time in which to sue. 6/30/95 Order at 7. The right to invoke the U.S. COGSA limitation period may be waived—indeed, such extensions are common in the industry—but the terms of a waiver are strictly construed. *Bunge Edible Oil Corp. v. M/V TORM RASK*, 756 F. Supp. 261 (E.D.La. 1991), *aff'd*, 949 F.2d 786 (5th Cir.), *cert. denied*, 505 U.S. 1207 (1992); *United Fruit Co. v. J.A. Folger & Co.*, 270 F.2d 666, 668-669 (5th Cir. 1959), *cert. denied*, 362 U.S. 911 (1960); 6/30/95 Order at 5-6, 8.

Prior to trial, Mammoet and Modul argued that Candyline's consent did not extend to Itel. 6/30/95 Order at 8. As a consequence, they contended that the statute of limitations precluded Itel from asserting its direct claims against them. This Court, despite noting that "[t]he most plausible reading of the correspondence shows that Candyline consulted the vessel owners and management, secured their consent to an extension, and then relayed this information to Itel on behalf of all concerned," nevertheless found the statute of limitations question to be a genuine issue of material fact, since later communications gave "the distinct impression that Candyline and [Mammoet and Modul] viewed the extension as a grant to Candyline alone." 6/30/95 Order at 8-9. Thus, after two rounds of motions for summary judgment, the issue of whether Itel's claims against Mammoet and Modul were time-barred was preserved for trial.

At trial Candyline, evidently secure in the fact that Mammoet would indemnify it for any liability incurred with respect to Itel, made no effort to prove that the six-month extension applied to the vessel owner and manager. More puzzling, however, is why Itel neglected any discussion of the subject. In closing argument, Mammoet and

Modul presented no evidence but formally moved to bar, on statute of limitations grounds, any claim Itel had against Mammoet and Modul through the Candyline-Mammoet bill of lading. Tr. at 215-16. Hence, by the close of trial, the parties scarcely resolved an issue explicitly left open for resolution in oral argument.

Now confronting the issue squarely, the Court finds Itel has not carried its burden of proving that the vessel's owners and manager granted an extension allowing for direct suit. Not only has Itel already admitted that Modul and Mammoet did not directly grant it an extension of time, 6/30/95 Order at 7, but, as previously discussed, waivers of the statute of limitations are strictly construed, no matter what their prevalence in the maritime community. *See A.B. Volvo v. M/V ATLANTIC SAGA*, 534 F. Supp. 647, 648-49 (S.D.N.Y. 1982) (extensions granted by vessel's agent do not bind vessel when latter refused to give extension on its own behalf). Furthermore, Clause 17—an item in full force in both the Itel-Candyline and Candyline-Mammoet bills of lading—limits Itel's recovery to contract-based remedies alone and entitles a bailee to take advantage of liability liimts provided by law (here, U.S. COGSA). Thus, Itel's direct claims against the vessel,[9] its owner, and its manager—including those in tort—are time-barred, and Itel's only basis for recovery stems from its agreement with Candyline.

C. Statutory Regimes Limiting Liability

In ascertaining the extent to which Candyline and (by extension) Mammoet are liabel to Itel, this Court has already ruled that the Itel-Candyline agreement is governed by the Hague-Visby Rules, a statutory regime adopted in

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[9] Nothing precludes the time bar from operating on *in rem* actions against the vessel. *See Bunge Edible Oil*, 949 F.2d at 787 (affirming dismissal of *in rem* claims against vessels as untimely); *Mitsubishi Corp. v. M.V. Oinoussian Strength*, 1994 WL 74087 at *4 (S.D.N.Y. 3/8/94) (same).

England that limits a carrier's liability. 6/30/95 Order at 15-16; 2/15/96 Order at 5-6. Those Rules state:

> Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is higher.

Article IV, British Carriage of Goods by Sea Act of 1971. *See also J.C.B. Sales, Ltd. v. M/V SEIJIN*, 1996 A.M.C. 1507, 1510, 921 F. Supp. 1168 (S.D.N.Y. 1996); *Pyropower Corp. v. M/V ALPS MARU et al.*, 1993 A.M.C. 1562, 1567-1568, 1993 WL 45978 (E.D.Pa. 1993). This Court, however, reserved judgment as to which liability scheme—Hague-Visby, Japanese COGSA, or U.S. COGSA—applies to the Candyline-Mammoet bill of lading.[10] Had § 1303(6) not barred Itel's independent claims against Mammoet, Modul and the TITAN SCAN, this determination would have been crucial, for it would have controlled Mammoet and Modul's direct liability to Itel. As it stands, the choice of liability scheme still dictates the extent of Mammoet's indemnity to Candyline, since, as discussed *infra* at 17, Candyline stands liable to Itel for breach of the contract of carriage.

U.S. COGSA applies compulsorily "to all contracts for carriage of goods by set to or from ports of the United States in foreign trade." 46 U.S.C. § 1312. "[R]egardless of any provision to contrary in the bill of lading or any rule to the contrary under foreign law . . . the parties do not have the freedom to displace COGSA with another

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[10] At the time Mammoet shipped Itel's containers, neither Japan nor the United States had adopted the Hague-Visby Rules. Facts at 11.

regime." 2A Benedict on Admiralty § 46 at 5-13. U.S. COGSA reads similar to the Hague-Visby Rules and provides:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

46 U.S.C. § 1304(5).

Notwithstanding this limitation, U.S. COGSA permits shippers and carriers to agree by contract to raise their liability to an amount exceeding $500 per package. *Id.* If the parties agree to a higher liability limit, then—but only then—may a foreign legal regime trump U.S. COGSA. *See, e.g., Ilva U.S.A., Inc. v. M/V BOTIC, et. al.*, 1993 A.M.C. 240, 243-44, 1992 WL 296562 (E.D. Pa. 1992) (finding mutual intent to raise $500 limitation of U.S. COGSA where goods carried from Italy to Philadelphia). If, however, the question of whether the parties agreed to a higher limit is "irretrievably ambiguous," then U.S. COGSA limit applies by default, for there is no clear intent otherwise. 6/30/95 Order at 14; *see Valmet Materials Handling Equipment, Inc. v. Nedlloyd Linjen B.V. Rotterdam*, 1993 A.M.C. 1243, 1246, 1993 WL 204149 (M.D.Fla. 1993).

III. *Analysis*

Candyline unquestionably breached its contract of carriage with Itel when twenty reefers were tossed overboard and six others suffered extensive damage during the voyage from Japan to Savannah. Tr. 40. After all, in striking an agreement with Candyline, Itel sought to ensure safe passage of its cargo from Japan to Savannah. However, Itel's recovery is constrained because, as mentioned

earlier, its direct claims against Mammoet and Modul are time-barred and, as explained below, the Hague-Visby statutory regime limits the extent of Candyline's liability.

B. Liability Limitations and The Extent of Indemnity

This Court previously concluded as a matter of law that the Hague-Visby statutory scheme governs the Itel-Candyline accord. 6/30/95 Order at 1416; 2/15/96 Order at 5-6. In making this determination, it evaluated numerous factors, *see Z.K. Marine, Inc. v. M/V ARCHIGETIS*, 1993 A.M.C. 1444, 808 F. Supp. 1561 (S.D. Fla. 1992), and found that: (i) the bill of lading was issued in Japan, 2/15/96 Order at 6; (ii) Candyline, the "carrier" for purposes of the transaction, had its principal place of business in England, and Clause 3 of the bill of lading provides that the law of the country in which the carrier has its principal place of business applies to any dispute; (iii) previous courts had construed the same General Clause Paramount (the bill of lading's Clause 2) as evidencing an intent to agree to a higher liability limitation than that provided by U.S. COGSA; and (iv) Clause 10 ("English law to apply"), a provision to which the parties mutually agreed, incorporated a foreign legal regime (i.e., Hague-Visby) with a liability limit exceeding $500 per package. 6/30/95 Order at 14-16; *Pyropower Corp.*, 1993 A.M.C. at 1570-71; *Ilva*, 1993 A.M.C. at 242-43.[11]

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[11] In directing its attention towards factors (i) and (iv), the Court's analysis was guided by Article X of the British Carriage of Goods by Sea Act of 1971, which states that

> [t]he provisions of these Rules [Hague-Visby] shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:
>
> (a) the bill of lading is issued in a contracting State, or
>
> (b) the carriage is from a port in a contracting State, or
>
> (c) the contract contained in or evidenced by the bill of

In contrast, the Court could not ascertain on summary judgment whether Candyline and Mammoet agreed to a higher limitation than U.S. COGSA's to operate on their own bill of lading. 6/30/95 Order at 17-19. Consequently, the Court received evidence concerning this issue at trial. While the provisions of the Candyline-Mammoet contract are often identical to its Itel-Candyline counterpart—and although Candyline repeatedly has trumpeted the "pass through" aspect to its dealings—the contracts must be evaluated as distinct agreements, since the "proper method of defining relationships between shippers, NVOCCs, and vessel owners is to treat the various bills of lading as just that—discrete shipping agreements knowingly entered by the parties involved." 6/30/95 Order at 20 (citing *Gross Machinery Group v. M/V ALLIGATOR INDEPENDENCE*, 1994 A.M.C. 732, 737-739, 1992 WL 47557 (S.D.N.Y. 1992)).

Trying to absolve itself of liability entirely, Candyline argued that mirror agreements must be controlled by the same statutory regime. Because Hague-Visby's liability limits are higher than those established by U.S. or Japanese COGSA, Candyline sought to prove that Hague-Visby governs the Candyline-Mammoet agreement, lest Candyline not receive full indemnity from Mammoet for any sums paid to Itel as damages.[12] To this end, Mr. Marks

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lading provides that these Rules or legislation of any State giving effect to them are to govern the contract.

That the Itel-Candyline bill of lading was issued in Japan (factor (i)) did not lead the Court to conclude that Article X(a) was satisfied, since Japan was not a "contracting state" in 1990. *Supra* note 10. The presence of typewritten Clause 10 (factor (iv)), however, combined with factors (ii) and (iii), evidenced that the Hague-Visby Rules governed the contract, thus satisfying Article X(c).

[12] At bottom, Candyline's primary concern is "parallelism." Tr. at 224-226. Because it aims to effectuate a complete "pass through" of liability, it insists that the same statutory regime should control both contracts. While Candyline argued at trial that the Hague-

testified that in knowingly accepting a contract that stood "back-to-back" to the Itel-Candyline accord, Mammoet explicitly acceded to the application Hague-Visby. Mr. Marks steadfastly adhered to this assertion despite conceding that the parties never actually spoke about liability schemes *per se*.

In light of the evidence adduced at trial, as well as Candyline's post-trial concessions, *see supra* note 12, the Court finds that U.S. COGSA governs the Candyline-Mammoet contract. As with the Candyline-Itel agreement, Candyline and Mammoet reached the terms of the booking note in London, but signed the bill of lading, which incorporated the terms of the booking note *in toto*, in Japan. Again Clause 3 was left intact, but this time the carrier's principal place of business is Mammoet's office in Amsterdam, not London. Thus, unlike its analysis of the Itel-Candyline accord, which led to the inexorable conclusion that Hague-Visby controlled, these factors do not point the Court in a definite direction.

Muddying the waters further are Clauses 2 and 10. The parties did not strike Clause 2, which provides that the bill of lading incorporates the Hague Rules as enacted in the country of shipment (here, Japan) and has been read by other courts as an agreement to a liability limitation greater than that provided by U.S. COGSA. *See, e.g., Ilva,* 1993 A.M.C. at 242-43; *Associated Metals & Mineral Corp. v. M/V ARKTIS SKY,* 1991 A.M.C. 1499, 1505-06, 1991 WL 51087 (S.D.N.Y. 1991), *vacated and remanded on other grounds,* 978 F.2d 47 (2d Cir. 1992). Mr. Marks, however, also introduced Clause 10 ("English law to apply") into both agreements to which Candyline was party, and a "typical insertion" ought not be read in a manner rendering it superfluous. Still, he admitted he did not intend to address liability

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Visby rules apply to the Candyline-Mammoet contract, it has since reversed course. In its post-trial submissions, it contends that its contract with Mammoet is governed by Japanese COGSA.

schemes in inserting the provision, and he could not produce a shred of documentation evincing Mammoet's express agreement to a higher liability limit. Leaving aside the uncontroverted destruction of Candyline's files, Mammoet has no tangible record of Candyline's "back-to-back" intent, and assuredly, an understanding of such material import would have been reduced to writing.

Even if, during negotiations, Mr. Marks communicated his hopes far a "pass through" agreement to Mr. Carroll, the final versions of the booking note and bill of lading are devoid of any language to this effect. As a result, the parol evidence rule bars introduction of this evidence. *See Warren v. Ajax Navigation Corp. of Monrovia,* 1995 A.M.C. 2609, 1995 WL 688421 at *1 (S.D.Fla. 2/3/95) ("When a contractual agreement has been reduced to an integrated writing, the parol evidence rule dictates that evidence, whether parol or otherwise, of antecedent understanding and negotiation will not be admitted for the purpose of varying or contradicting the writing."); *see also Anyangwe v. Nedlloyd Lines,* 1996 A.M.C. 1083, 909 F. Supp. 315, 322 (D.Md. 1995) (assuming that prior oral understanding existed, but nonetheless barring evidence on parol evidence grounds). Whatever Candyline's expectations—articulated or implied—Mammoet is not held to a metaphysical standard of comprehension. This conclusion is strengthened by the fact that Mammoet had no hand in bringing Clause 10 into the Candyline-Mammoet bill of lading. *See Associated Metals,* 1991 A.M.C. at 1507 (ambiguities in bill of lading are construed against the drafter); *Tano Automation, Inc. v. U.S.,* — F. Supp. —, —, 1996 WL 537744 at *3 (E.D. La. 9/20/96) (same).

In its closing argument, Candyline urged the Court not to exalt boilerplate terms over a specially-added provision like Clause 10. Tr. at 226. While mindful that customized provisions preempt preprinted ones, *see Insurance Co. of N. Amer. v. S/S SEALAND DEVELOPER,* 1990

A.M.C. 2967, 2970 & n.4, 1989 WL 85789 (S.D.N.Y. 1989), Clause 10 alone is not dispositive as to whether Mammoet agreed to a higher liability limit than that provided by U.S. COGSA. The Court is reluctant to give a cryptic snippet ("Engish law to apply" to what?) such effect that it constitutes the sole measure of Mammoet's express agreement to displace U.S. COGSA; indeed, an English solicitor retained by Candyline itself has sworn, "[T]he fact that the terms of the contract of carriage provided for English law to apply will not result in the incororation of the Hague-Visby rules." Wisdom Aff. ¶¶ 17, 20. In striking its deal with Mammoet, Candyline was under no obligation to utilize the same standard forms it used with Itel. Instead, Candyline could have achieved its "pass through" objective by doing what others do on a regular basis, i.e., spell out its intent in a customized contract.

Faced with tht ambiguity of preprinted Clause 2, which points in the direction of Japanese COGSA; boilerplate Clause 3, which calls for the application of Dutch law; and typewritten Clause 10, which applies English law but, according to accepted rules of contractual construction, must be construed against Candyline, the Court returns to its initial point of departure: U.S. COGSA applies *ex proprio vigore* "to all contracts of carriage of goods by sea to or from ports of the United States." 46 U.S.C. § 1312; *R.B.K. Argentina S.A. v. M/V DR. JUAN B. ALBERDI*, 935 F. Supp. 358, 366 (S.D.N.Y. 1996).[13]

Although parties to a contract can agree to deviate upwards from U.S. COGSA's package limitation, 46 U.S.C. § 1304(5), Candyline failed at trial to meet its burden of proving Mammoet's unqualified assent to a limit above the $500 ceiling. Previously, the Court noted that "the evidence of conscious agreement by Mammoet

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[13] Indeed, "Additional Clause B" of the Candyline-Mammoet bill of lading explicitly contemplates the possibility that U.S. COGSA will govern.

and Modul is fairly thin," and also remarked that "[t]here is no direct evidence that the defendants consciously agreed to increase their liability for any cargo damage[.]" 6/30/95 Order at 18-19. Having received and reviewed the weight of the evidence, nothing has altered the Court's earlier inclinations.[14] Thus, Candyline—the "shipper" for purposes of its transaction with Mammoet—is saddled with the $500 per package limitation,[15] having never declared the value of the goods Mammoet transported. *See* 46 U.S.C. § 1304(5); *Rockwell Int'l Corp. v. S/S KOELN EXPRESS*, 1987 A.M.C. 2537, 2539, 1987 WL 33397 (D.Md. 1987). Having drafted the bill of lading, Candyline unquestionably had a "fair opportunity" to make such a declaration. *Hoechst Celanese Corp. v. M/V TRIDENT AMBER*, 1992 A.M.C. 2769, 2774-75, 1992 WL 179219 (S.D.Ga. 1992); *Unimac Co., Inc. v. C.F. Ocean Service*, 43 F.3d 1434, 1438 (11th Cir. 1995.

In sum, Candyline breached its contract of carriage with Itel, but its liability to Itel is capped by the application of the Hague-Visby Rules. Mammoet, in turn, must indemnify Candyline for damages Candyline pays to Itel, but that reimbursement is restricted by the application of U.S. COGSA. *See SPM Corp. v. M/V MING MOON*, 22 F.3d 523, 525 & n. 3, 4 (3d Cir. 1994) (where an NVOCC has signed separate bills of lading with the shipper and carrier, each contract may specify different liability limits).

C. Breaking the Limits

In an effort to avert statutory liability limitations, at trial Itel sought to prove that re-stacking the containers

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[14] In short, the Court finds that given the circumstances surrounding the formation of the Candyline-Mammoet agreement, Article X(c) of the British COGSA of 1971 is not satisfied in this instance. *See supra* note 11.

[15] Each reefer constitutes a "package" for U.S. COGSA purposes. *See Hayes-Leger Assocs., Inc. v. M/V ORIENTAL KNIGHT*, 765 F.2d 1076, 1082 (11th Cir. 1985) (adopting Second Circuit's definition of "package"); *Pyropower Corp.*, 1993 A.M.C. at 1572-73.

five high in Balboa was a reckless act by Candyline and Mammoet, in contravention of both the Yokohama port regulations and the Container Stowage Plan. As further evidence, Itel submitted that the use of vertical lashings and double stacking cones in securing the reefers departed so substantially from the accepted practice of criss-cross lashings and twistlocks as to constitute reckless behavior by the defendants. Finally, Itel maintained that the TITAN SCAN's call and restowing at Balboa amounted to an impermissible deviation sufficient to oust the statutory regime limiting liability.

Itel's agreement with "carrier" Candyline is governed by the Hague-Visby regime, which prohibits the package limitation from applying in cases of recklessness:

> Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability . . . if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that the damage would result.

Article IV(5)(e); *In Re Tecomar, S.A.*, 1991 A.M.C. 2432, 765 F. Supp. 1150, 1182 (S.D.N.Y. 1991). Despite having known since the middle of 1995 that the Hague-Visby rules apply to its contract with Candyline, Itel has provided the Court with the text of exactly one case addressing the issue of reckless conduct. In *The Pembroke*, 2 Lloyd's Rpts. 291 (1993), the judge noted that the issue of recklessness "is a matter of fact for each case." *Id.* at 296. That said, the Court finds Mammoet's conduct—for which Candyline is liable to Itel—negligent at worst.[16]

Having already rejected Itel's arguments regarding the Yokohama port regulations and the Container Stowage

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[16] At trial, Mammoet all but conceded it acted negligently. Tr. at 223-24 ("90 percent of the containers got there safely. That can't be reckless; [it] may be negligence.").

Plan, *see supra* notes 5 and 6, the Court now concludes that in using vertical lashings and double stacking cones, Defendants did not take "a calculated risk with the full appreciation of the dangers and probable consequences." *The Pembroke*, 2 Lloyd's Rpts. at 297.[17] Indeed, an expert in marine containerization surmised that an inexplicable failure in the bridge fittings proximately caused the loss of stow. Tr. at 94-95, 104; Streeton Dep. at 54-58. For this reason, it cannot be said that Mammoet or the crew of the TITAN SCAN "knew of the probable result"—that is, that the cargo would be thrown overboard—when the reefers were restowed five high by stevedores in Balboa. *The Pembroke*, 2 Lloyd's Rpts. at 296. As it stands, nearly ninety percent of the cargo arrived in Savannah in good condition. Thus, Itel cannot break the Hague-Visby limitations on the grounds that Defendants acted recklessly.

Nor can Itel evade Hague-Visby for reasons relating to unreasonable geographic deviation or restowage ("quasi-deviation"). With Itel failing to introduce adequate English law on this score, the Court resorts to the application of U.S. admiralty law principles. *Cavic v. Grand Bahama Development Co. Ltd.*, 701 F.2d 879, 882 (11th Cir. 1983) (citing Restatement (Second) of Conflicts § 136, coment h, at 378-79 (1971)); *Cantieri Navali Riuniti v. M/V SKYPTRON*, 802 F.2d 160, 163 n. 5 (5th Cir. 1986) ("In the absence of sufficient proof

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[17] *Cf. Konica Business Machines v. Vessel SEA-LAND CONSUMER*, 1996 A.M.C. 1761, 1762-63, 1996 WL 468770 (C.D.Cal. 1996) (finding negligence, "but not more," where cargo was jettisoned after crew failed to secure twistlocks; such action did "not rise to the level of an unreasonable deviation" sufficient to deprive vessel of U.S. COGSA's liability limitations); *Tecomar*, 765 F. Supp. at 1184-1185 & n. 93, 94 (expressing reluctance to oust statutory liability limitations, for whether conduct is characterized as "willful," "wanton" or "reckless," courts ought not evaluate "in almost every case the degree of the carrier's culpability") (citations omitted).

to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied.") (cites and quotes omitted).

The doctrine of deviation provides "that when a carrier deviates markedly from the contract of carriage, [U.S.] COGSA does not apply because the bill of lading, which acts as the contract of carriage, is nullified." *Unimac*, 43 F.3d at 1437. *See also Yang Machine Tool Co. v. Sea-Land Service, Inc.*, 58 F.3d 1350, 1358 (9th Cir. 1995) (defining deviation as "a serious departure from the contract of carriage, exposing the cargo to unanticipated and additional risks.") (cites and quotes omitted). Courts have applied the doctrine "sparingly," reserving it for instances of unreasonable geographic departures and unauthorized on-deck stowing. *Unimac*, 43 F.2d at 1437. While conceding that mere re-stacking at a scheduled port does not warrant the ouster of U.S. COGSA, *see Anyangwe*, 909 F. Supp. at 321 (indeed, even "[i]ntentional restowage at an [unscheduled] intermediate port is neither a deviation nor a quasi-deviation"), Itel nevertheless insists that application of the deviation doctrine is appropriate here.

The Court disagrees. For starters, Clause 5 of the Itel-Candyline and Candyline-Mammoet bills of lading states that the vessel, "engaged in liner service," "is not limited to the direct route" of travel.[18] Where the bill of lading provides such notice to the shipper, it precludes a finding of deviation. *See Yang Machine*, 58 F.3d at 1352 (no deviation where bill of lading gave carrier the right to substitute vessels without informing shipper); *Great Amer. Ins. Cos. v. M/V ROMERAL*, 934 F. Supp. 744, 747 (E.D.La. 1996) ("stops at a vessel's customary ports of call, whether or not the bills of lading list those ports,

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[18] While the parties struck the remainder of Clause 5, there is no indication that this portion was unintentionally left intact. Tr. at 65, 182, 218-19; Cook Dep. at 17-18.

cannot costitute deviations so long as the carrier has made those stops known to the shipper . . ."). In stopping at Balboa, the TITAN SCAN hewed close to the "direct" rout of travel. *Cf.* SPM, 22 F.3d at 528 (no geographic deviation where vessel restowed cargo at port in New Jersey in transit from Yokohama to Norfolk, Virginia).

In any event, although Mr. Marks testified that the call a Balboa was unplanned, nothing in the record indicates that the port is not on ordinary trade routes from Yokohama to Savannah.[19] *See General Elec. Co. Int'l v. S.S. NANCY LYKES*, 706 F.2d 80, 84 (2d Cir.), *cert. denied*, 464 U.S. 849 (1983) (defining reasonableness of geographic deviation in terms of degree of departure from customary routes). Nor has Itel shown that docking at Balboa was unreasonable under the circumstances: the record is devoid of evidence demonstrating, for example, that Balboa was unable to handle the shifting of reefer cargo or that the port suffered from "labor problems" at the time the TITAN SCAN stopped there. *See SNC S.L.B. v. M/V NEWARK BAY*, 1996 A.M.C. 1764, 1773, 1996 WL 82384 (S.D.N.Y. 1996).[20] Because, as noted *supra* at 25-26, the Court is not convinced that calling at Balboa "substantially increase[d] the exposure of [Itel's] cargo to foreseeable dangers that would have been avoided had no deviation occurred,"

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[19] Simply because the Captain of the TITAN SCAN had never before restowed or discharged cargo in Balboa, Baermann Dep. II at 40, does not prove that the port was not part of routine trade routes. The Captain, after all, estimated that he had traversed the Panama Canal and the Caribbean but four to five times in a seafaring career spanning forty years. Baermann Dep. I at 14-15, 39.

[20] Itel has cited *SNC*, Tr. at 214-15, for the proposition that a deviation occurs when a carrier's actions are improperly motivated by a desire for self-gain (such as taking on additional cargo). *SNC*, 1996 A.M.C. at 1775. Without addressing the merits of this assertion, the Court notes that the *SNC* court explicitly avoided this rationale as the grounds for its decision. *Id.*

id. (cites and quotes omitted), Itel cannot take cover under "unreasonable geographic deviation" as the basis for ousting the governing liability scheme.

As for Itel's arguments regarding "quasi-deviation," the Court is equally unpersuaded. In *SPM Corp. v. M/V MING MOON*, 965 F.2d 1297 (3d Cir. 1992), the vessel's owner ordered restowage to make room for additional cargo while still attempting to leave adequate space for discharge of the shipper's load. During this process, the shipper's cargo was damaged. *Id.* at 1299. When the plaintiff charged that the defendants impermissibly shifted its cargo, the Third Circuit responded by noting that "the doctrine of quasi-deviation should not be viewed expansively in the post-COGSA era." *Id.* at 1304; *see also M/V ROMERAL*, 934 F. Supp. at 748 ("the notion of non-geographic deviation may be of doubtful justice under modern conditions, of questionable status under COGSA, and of highly penal effect") (cites omitted). The *SPM* panel went on to remark that "a deviation requires more than negligence." *SPM*, 965 F.2d at 1304 n. 6. Since the Court has already found that Mammoet did not act recklessly, Itel cannot prevail on claims related to the restowing of cargo in Balboa. Accordingly Itel cannot thwart the application of the Hague-Visby liability limitations.[21]

D. Prejudgment Interest and Attorneys' Fees

Having breached the contract of carriage, Candyline must pay, in accordance with the liability limits prescribed by the Hague-Visby statutory regime, damages to Itel for the loss of 26 reefers. Consequently, Itel—as it expected, Tr. at 8—cannot recover costs incurred in removing the

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[21] The Court pauses to note that to the extent Candyline as "shipper" likewise attempts to free itself from the shackles of U.S. COGSA—e.g., Candyline suggested that Mammoet could not avail itself of Clause 5 in the bill of lading because Mammoet was not "engaged in liner service", Tr. at 177—such efforts must be denied for the same reasons set forth above.

refrigerated containers from the waters of the Caribbean. *Cf. Armco Chile Prodein, S.A. v. M/V NORLANDA*, 1993 A.M.C. 2403, 880 F. Supp. 781, 796 (M.D. Fla. 1991) (where U.S. COGSA liability limitation, inapplicable, plaintiff entitled to damages for necessary expenses incidental to the loss).

Despite the applicability of the Hague-Visby limitation, Itel is nevertheless entitled to prejudgment interest. *See Noritake Co., Inc. v. M/V HELLENC CHAMPION*, 627 F.2d 724, 729 (5th Cir. 1980) (awarding prejudgment interest in a U.S. COGSA action). As a general rule, prejudgment interest is awarded in admiralty cases as "compensation to the plaintiff for the use of funds that were rightfully his." *M/V OCEAN LYNX*, 901 F.2d at 942. The Court finds no "peculiar circumstances" making it iinequitable for Candyline (and, in turn, Mammoet) to avoid paying prejudgment interest. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550-51 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). Therefore, prejudgment interest shall accrue from the date of Itel's loss at the same rate as postjudgment interest, which is calculated pursuant to 28 U.S.C. § 1961. *Ocean Svcs. Towing and Salvage v. Brown*, 1993 A.M.C. 2701, 810 F. Supp. 1258, 1265 (S.D.Fla. 1993); *see also City of Milwaukee v. Cement Division, Nat'l Gypsum Co.*, 1995 A.M.C. 1882, 1885, 115 S.Ct. 2091 (1995) (observing that while there is no federal statute governing the award of prejudgment interest, the "question is governed by traditional judge-made principles").

Not only must Mammoet, within the confines of U.S. COGSA, reimburse Candyline for the latter's liability to Itel, but Mammoet must also indemnify Candyline for reasonable attorney's fees and costs associated with defending against Itel's action. *See* 2/15/96 Order at 4-5. Candyline and Mammoet have agreed that Candyline will submit a separate motion and brief on these issues after this Order is entered. Tr. at 204.

To this end, the parties arre advised to bear in mind the lessons of *SPM Corp. v. M/V MING MOON*, 22 F.3d 523 (3d Cir. 1994), a case where the court held that the NVOCC, having signed separate bills of lading which specified different liability limitations, could not recover fees and expenses incurred solely from defending against the higher liability limit. *Id.* at 528. In addition, Candyline may not recover attorney's fees expended in its earlier efforts to obtain indemnification from Mammoet. *See M/V OCEAN LYNX*, 901 F.2d at 941 n. 15.

IV. *Conclusion*

While Defendant Candyline breached its contract of carriage with Plaintiff Itel, it need not reimburse Itel for the full cost of the 26 lost and damaged refrigerated containers; rather Candyline's liability is limited by the application of the Hague-Visby scheme, as Itel was unable to prove deviation sufficient to oust the contract of carriage. Candyline must also pay Itel prejudgment interest running from the date of the breach, i.e., the date the containers were thrown overboard.

For its part, Defendant Mammoet Shipping B.V. must reimburse Candyline for damages paid to Itel; that indemnity, however, is capped by the application of U.S. COGSA. Mammoet must also indemnify Candyline for reasonable attorney's fees and costs incurred in defense of this action. Additionally, Itel's direct claims—both contract- and tort-based—against Defendants Mammoet, Modul Carriers A&G Co., and the M/V TITAN SCAN are deemed untimely and thus barred. Pusuant to F. R. Civ. P. 21, Defendants Modul and M/V TITAN SCAN are dropped from the action. The caption on future filings shall reflect this result, as well as the fact that Autoridad Portuaria Nacional has been dropped, too.

Candyline is directed to submit a brief detailing its reasonable attorney's fees and exenses within 20 days of entry of this Order. Mammoet will then have 10 days to

respond, if it so chooses. Once the Court passes on these sums, all parties shall confer and submit, within a time to be later specified, a judgment reflecting computations consistent with the Court's rulings.

SO ORDERED this 24th day of October, 1996.

/s/ B. Avant Edenfield
B. AVANT EDENFIELD
Chief Judge
United States District Court
Southern District of Georgia

APPENDIX D

[Filed Feb. 20, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV 494-55

ITEL CONTAINER CORPORATION,
Plaintiff,

v.

M/V TITAN SCAN, her engines, boilers, etc., MODUL CARRIERS A.G. & CO. "TITAN SCAN" SCHIFFAHRTS K.G., SKY SHIPPING LTD., and MAMMOET SHIPPING B.V.,
Defendants.

FINAL JUDGMENT

Judgment is hereby granted in favor of Plaintiff Itel Container Corporation ("Itel") and against Defendant Sky Shipping Ltd. ("Candyline") in the amount of $385,136.96. *See* 10/24/96 Order. This sum includes $291,509.83, calculated in accordance with the liability limitation provisions of the Hague-Visby Rules, as well as prejudgment interest totaling $93,627.13, calculated at a rate of 5.353% from 10/11/90. 2/18/97 Proposed judgment at 1-3.

In addition, Defendants Mammoet Shipping B.V., Modul Carriers A.G. & Company ("Modul") and M/V TITAN SCAN must indemnify Candyline in the amount of $73,145.47. *See* 2/15/96 and 10/24/96 Orders.[1]

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[1] After holding that Itel's direct claims against Modul and M/V TITAN SCAN were untimely and thus barred, the Court dropped

This sum includes $13,000.00, calculated in accordance with the package limitations of the United States Carriage of Goods by Sea Act; prejudgment interest totaling $4,175.34 (again, calculated at the 5.353% rate); and $55,970.13 for reasonable attorney's fees and costs (*see* 1/17/97 Order). 2/18/97 Proposed Judgment at 2-3.

This case is hereby closed.

SO ORDERED, this 20th day of February, 1997.

/s/ B. Avant Edenfield
B. AVANT EDENFIELD
Chief Judge
United States District Court
Southern District of Georgia

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those Defendants as parties to this action. 10/24/96 Order at 34. However, the Court had previously ruled—as all parties well recognize in their Proposed Judgment—that Modul and M/V TITAN SCAN stand liable for indemnification to Candyline. 2/15/96 Order at 4-5. To this end, these parties are reinstated; the caption has been amended accordingly. *See* F. R. Civ. P. 61.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action Number: CV494-55

ITEL CONTAINER CORPORATION,
Plaintiff,

vs.

M/V TITAN SCAN, HER ENGINES, BOILERS, ETC,
MODUL CARRIERS A G & CO.
TITAN SCAN SCHIFFAHRTS K., CANDYLINE LTD
MAMMOET SHIPPING B.V. and
AUTORIDAD PORTUARIA NACIONAL,
Defendants.

FIRST AFFIDAVIT OF MARTIN JOHN WISDOM

I, MARTIN JOHN WISDOM, of 14-15 Philpot Lane, London, EC3M 8AJ, England, hereby MAKE OATH and Say as follows:

1. I am a practicing solicitor of the Supreme Court of England and Wales and a partner of Waterson Hicks of the above address. I qualified as solicitor in 1982 since when I have been employed exclusively in dealing with all aspects of maritime law including cargo claims, first as an assistant with the maritime law firm of Horrocks & Co then later as a partner in that firm. I was a founding partner of the maritime law firm Waterson Hicks in 1990.

2. The facts, matters and opinions stated herein are true and to the best of my knowledge, information and belief.

3. I have been asked by Mr. T. Langston Bass of Brennan, Harris & Rominger, acting for Candyline Limited, to give my opinion of English law on 3 matters set out below arising as a matter of construction out of the following 3 documents, copies of which are now produced and shown to me marked "MJW 1":

   (1) a Liner Booking Note dated 30th August 1990 on the Conlinebooking form (pages 1 to 5);

   (2) a Liner Bill of Lading No. MSBV900200 issued on 8th September 1990, naming Candyline Limited as the Shippers (pages 6 to 8) ("the Candyline Bill of Lading");

   (3) a Liner Bill of Lading issued on 8th September 1990 naming as Shipper ITEL Container Corp International, Tokyo, Japan, on behalf of ITEL Container International Corp, San Francisco USA (pages 9 to 11) ("the Itel Bill of Lading").

4. The 3 points on which I have been asked for my opinion are:

   (1) Whether the English Carriage of Goods by Sea Act 1971 and therefore the Hague-Visby rules are incorportaed into the contract of carriage by necessary inference from the fact that the terms of the contract of carriage provides for English law to be applicable.

   (2) Whether the reference to "Bill of Lading" in article X(a) of the Hague-Visby rules would be read as a reference to the "Booking Note" with the consequence that, the Booking Note having been issued in England, the requirements of article X(a) would be met.

   (3) Whether the effect of Clause 2, the General Paramount Clause, of the Itel Bill of Lading

would be effective to incorporate the Japanese Carriage of Goods by Sea Act enacting the Hague Rules or the Hague Rules Convention itself.

5. I understand that the circumstances of the documents are as follows:

(1) On 30th August 1990 Candyline Limited as Merchant entered into a Liner Booking Note contract with Mammoet Shipping BV as Carrier on the "CONLINEBOOKING" form for the carriage of a quantity of reefer containers on the mv "TITAN SCAN".

(2) Also on 30th August 1990, Candyline Limited as Carrier entered into a Liner Booking Note contract with Itel Containers International Corporation of San Francisco, as Merchants for the carriage of the same quantity of reefer containers on the mv "TITAN SCAN".

(3) On 8th September 1990, Nedlloyd Lines Agencies KK, as agents for Mammoet Shipping BV, issued the Candyline Bill of Lading naming Candyline Limited as shippers of the containers and referring to their 30th August 1990 booking note.

(4) Also on 8th September 1990, AALL Barwil Agencies KK, as agents for Candyline Limited, issued the Itel Bill of Lading naming Itel Container Corp International of Tokyo on behalf of Itel Container International Corp of San Francisco as shippers of the containers and referring to their 30th August 1990 booking note.

(5) Subsequently, to obtain possession of the goods:

(a) Barwil Agencies (Louisiana) Inc (agents for Candyline Limited) presented the

Candyline Bill of Lading to the ship and obtained the goods;

(b) Itel Container International Corp of Charleston, South Carolina, presented the Itel Bill of Lading to Candyline's agents, Barwil Agencies (Louisiana) Inc, and thereby obtained the goods.

Whether the English Carriage of Goods by Sea Act 1971 and therefore the Hague-Visby rules are incorporated into the contract of carriage by necessary inference from the fact that the terms of the contract of carriage provided for English law to be applicable.

6. This point can be dealt with shortly as it has been definitively determined by the English Court of Appeal. Previous decisions of the English Court of Appeal are binding on all Courts and Tribunals in England and Wales, including the Court of Appeal, with the only exception of the House of Lords. The House of Lords deals with very few cases each year; in 1994 only 64 appeals were determined across the entire range of English, Welsh, Northern Irish civil and criminal law and Scottish civil law. Permission to appeal to the House of Lords is correspondingly rarely given. Consequently, a decision of the English Court of Appeal would ordinarily be considered definitive.

7. The relevant English authority is the case of *Hellenic Steel Co. & Others - V - Svolamar Shipping Co. Ltd. & Others*, the Court of Appeal decision being reported at **[1991] 1 Lloyds Reports 370.** The case would ordinarily be referred to by the name of the ship involved in the dispute, *The Komninos S*, by which name I shall refer to it hereinafter. The Lloyds Law Reports are the specialist English law shipping and commercial reports which are generally used in shipping cases and are very highly regarded.

8. There is now produced and shown to me marked "MJW 2" a true copy of the report of the decision both in the Court of Appeal at **[1991] 1 Lloyds Reports 370** and, for completeness, at First Instance which is reported at **[1990] 1 Lloyds Reports 541.**

9. The conclusion of the Court of Appeals on the point on which I am asked to give my opinion is stated in the headnote on page 371 in the right hand column at item (3):

> "the Hague-Visby Rules were not incorporated and the shipowners were entitled to rely on the exemption clauses in the bill of lading;".

10. Lord Justice Bingham gave the main judgement beginning at page 372. Lord Justice Nourse agreed with Lord Justice Bingham beginning at page 377 towards the end of the right hand column. He also specifically stated that the Hague-Visby rules were not incorporated. Lord Justice Lloyd also agreed with Lord Justice Bingham, at page 378. It is therefore the judgment of Lord Justice Bingham which needs to be considered.

11. The judgment of Lord Justice Bingham begins at page 372. he first explains the relevant facts of the case. For our purposes, these are that:

    (1) A cargo of steel coils belonging to the Plaintiffs was shipped on the Defendants' vessel (the Komninos S) at Thessaloniki and carried to Ravenna under contracts of carriage contained in or evidence by bills of lading.

    (2) After discharge at Ravenna the cargo was found to have been serious damaged by water.

    (3) The cargo owners issued at Writ against the ship owners claiming damages for breach of contract and duty, bailment and negligence.

(4) In due course, the ship owners served a defence, relying, inter alia, on two exemption clauses in the bills of lading.

(5) The cargo owners served a reply stating that:

(a) the bills of lading were subject to Greek law, under which the exemption clauses were void; alternatively,

(b) the proper law of the bills of lading was English law and so included Hague-Visby Rules, article III, rule 8 of which rendered void the exemption clauses on which the shipowners relied.

(6) The shipowners rejoined, inter alia, that:

(a) the proper law of the bills of lading was not Greek, but English;

(b) the Hague-Visby Rules were not incorporated;

(c) the exemption clauses were effective to protect the shipowners.

12. Lord Justice Bingham then went on to set out the legal issues at page 372 in the right hand column by reference to the findings on each of them of the First Instance Judge. The relevant ruling of the First Instance Judge for our purposes was ruling (4):

> **"If contrary to his ruling (1) [that the proper law of the contract was Greek law], English law was the proper law of the contracts, the Hague-Visby Rules were not incorporated, and the shipowners were entitled to rely on the exemption clauses [in the bills of lading]."**

13. Lord Justice Bingham deal with this central issue beginning on page 376 in the left hand column. He first stated his conclusion before going on to give his reasons. His conclusion was expressed as follows:

> "If, contrary to his submission, English law was the proper law of these [bill of lading] contracts, Mr. Collins [for the cargo owners] argued that English law included the Hague-Visby Rules and accordingly invalidated the exemption clauses on which the shipowners relied. The [First Instance] Judge rejected this submission (which on his primary conclusion did not of course arise) and I agree with him."

14. Lord Justice Bingham then gave his reasons from page 376 left hand column beginning at the last full paragraph. He first rejected any suggestion that the Carriage of Goods by Sea Act 1971 and correspondingly the Hague-Visby Rules applied automatically by operation of article X(a) or (b) of the Hague-Visby Rules.

15. He then turned to the question of incorporation beginning at page 376 in the right hand column just below half way down and ending at the end of the first paragraph in the left hand column on page 377. The learned Judge posed the question as:

> "Whether, assuming the choice of an English forum showed an intention that English law should govern the contracts [which he had held it did], the bills of lading "provided" that the legislation of the United Kingdom giving effect to the [Hague-Visby] Rules should govern the contracts."

16. The learned Judge concluded that the bills of lading did not so provide.

17. If a contract of carriage was found to be subject to English law, the English Courts would not attach significance to whether that arose by express choice or English law or, as in the *Komninos S*, because the parties intention that English law should govern the contract was to be inferred from other express

terms, though it was not itself express. Consequently, *The Komninos S* is clear and binding Court of Appeals authority that the fact that the terms of the contract of carriage provided for English law to apply will not result in the incorporation of the Hague-Visby rules.

18. Leave to appeal to the House of Lords was refused by the Court of Appeal (at page 378). An application to the House of Lords for leave to appeal was also refused. This shows that the House of Lords did not feel that the point merited any further consideration in the English Courts and is usually taken as an indication that the House of Lords considered that the point has been correctly decided by the Court of Appeal.

19. I should point out the although the appeal from the First Instance Judge was allowed, this was on the different point as to whether English law or Greek law was the proper law of the contract. This can be seen most clearly from the headnote in the Court of Appeal report which reproduced the essential findings both of the First Instance Judge and the Court of Appeals. I refer in particular to findings (3) and (4) of the First Instance Judge set out at page 371 in the left hand column where he held that Greek law governed the bills of lading and therefore the exemption clauses sought to be relied on by the shipowners were void and finding (1) of the Court of Appeal, also in the left hand column of page 371, where the Court of Appeal held that English law governed the bills of lading.

20. On the point on which I am asked to advise, namely whether the incorporation of the English Carriage of Goods by Sea Act 1971 and thereby the Hague-Visby rules is to be inferred from the fact that English law applied to the contract of carriage, both the First Instance Judge and the Court of Appeal

decided the point the same way: there was no incorporation. The First Instance Judge so held in the First Instance report [1990] 1 Lloyds Reports 541 at page 545 beginning at the bottom of the left hand column and ending half way down the right hand column. I have already set out the finding of the Court of Appeal on the point.

21. The Judge at First Instance in that case (Mr Justice Leggatt) is now a Court of Appeal Judge. As regards the Court of Appeal Judges:

    (1) Lord Justice Bingham who gave the main speech was for a number of years a Judge of the Commercial Court in England and Wales and is now the Master of the Rolls, the most senior Judge of the Court of Appeal in Charge of the entire Civil (as opposed to Criminal) law system in England and Wales. His appointment is based merit, not length of service.

    (2) Lord Justice Lloyd is now one of the twelve Law Lords sitting in the House of Lords.

    (3) Lord Justice Nourse is still a Court of Appeal Judge.

22. Consequently, the Judges who decided this point would be regarded as very strong Courts.

23. The case is treated as good authority on this point by a recent authoritative text book in this area: *Cooke, Young, Taylor, Kimball, Martowski and Lambert on Voyage Charters* **1993 Ed published by Lloyds of London Press Limited in the Lloyds Shipping Law Library Series,** which states at page 707:

    "The fact that English law included the Carriage of Goods by Sea Act 1971, and gives the Hague-Visby Rules the force of law, does not of itself mean that a bill of lading contract is governed by those Rules simply because it is ex-

pressly or impliedly governed by English law, where it is issued neither in a contracting state, nor in respect of cargo loaded in a contracting state: the Komninos S. There must, in such cases, be some specific reference to the Carriage of Goods by Sea Act 1971, or particular Hague-Visby legislation, in the bill of lading if it is intended to cause a bill of lading contract to be governed by the Hague-Visby Rules."

24. A copy of the frontispiece and of the relevant extract is now produced and shown to me marked "MJW 3".

25. Even were that no such binding authority to decide the point, in the context of this case where the terms of the contract of carriage expressly do contain a General Paramount Clause, which is the normal way in English law bills of lading for determining the applicable Convention (Hague-Visby) or other relevant enactment giving effect to either of them, there would be no scope for incorporating the United Kingdom Carriage of Goods by Sea Act 1971 or the Hague-Visby Rules (if they are not compulsorily applicable under Article X(a) or (B)), since this would be directly contrary to the express choice provisions of the General Paramount Clause.

26. An English Court would take the view that the contracts of carriage have provided in accordance with the General Paramount Clause as to the applicable Convention or enactment thereof; that this did not provide for the United Kingdom Carriage of Goods by Sea Act 1971 or the Hague-Visby Rules and that they should therefore not govern the contract. Consequently, on either approach, an English Court applying English law would be bound to hold that the United Kingdom Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules are not incorporated into the contract of carriage.

Whether the reference to "Bill of Lading" in article X(a) of the Hague-Visby rules would be read as a reference to the "Booking Note" with the consequence that, the Booking Note having been issued in England, the requirements of article X(a) would be met.

27. It has never been held, indeed I am not aware of it having been suggested, that the words "bill of lading" in the Carriage of Goods by Sea Act 1971 or the Hague-Visby Rules as set out in the Schedule to the Act can mean any more than "Bill of Lading" and possible also any similar documents of title by virtue of Article 1(b) whereby the meaning of contract of carriage is limited to contracts of carriage covered by the bill of lading or any similar documents of title.

28. The only circumstances where "bill of lading" has been read as something other than bill of lading or (possibly) similar document of title is where the parties have expressly agreed that the terms of their Charterparty are to be governed by the Hague-Visby Rules, for example by a term that the contract shall have effect subject to the Carriage of Goods by Sea Act of the United Sttes 1936: *The Adamastos* [1959] AC 133, a copy of which is now produced and shown to me marked "MJW 4". The Court has then held (in that case, for example) that the Hague-Visby Rules are then to be taken to apply notwithstanding that they are expressed to be limited to bills of lading and other similar documents of title and indeed section 5 of US COGSA expressly states that it is not to apply to Charterparties.

29. What is clear from this that the meaning of the word "bill of lading" in the Hague-Visby Rules will not be construed as meaning anything other than a bill of lading and (possibly) similar documents of title unless the parties have expressly made clear their intention that the Hague-Visby Rules shall apply notwithstanding their being limited to contracts of carriage

under bills of lading or similar documents of title. It certainly would not extend to include a booking note or charterparty. Consequently, there is no basis for construing "bill of lading" in Article X to include the Booking Note. Indeed to do so would be to stand English law in this area on its head.

30. I should perhaps clarify what appears to be some confusion on page 4 of a document I have been shown entitled "Plaintiffs' Memorandum of Law in Support of Its Motion for Parttial Summary Judgement". This document indicates that the booking note:

(1) contains a negotiated bill of lading; and

(2) was the contract of carriage.

31. The booking notes does not contain a negotiated bill of lading. It sets out the terms of the bill of lading which is to be used. The negotiated bill of lading, which is the relevant document for the purposes of Article X(a), is the Itel bill of lading which is given to Itel as evidence of the shipment of the containers at the load port and tendered by the consignee to obtain delivery of the containers at the discharge port. This document was issued in Japan and does not come within Article X(a).

32. The booking note, unlike the bill of lading, is not a document of title, nor is it a receipt for the goods, nor is it negotiated.

33. Furthermore, once the bill of lading is issued, the booking note ceases to be the contract of carriage: it states in terms above the signatures and just beneath the boxes on page 2:

> "It is hereby agreed that this Contract shall be performed subject to the terms contained on Page 1 and 2 hereof which shall prevail over any previous arrangements *and which shall in*

> *turn be superseded (except as to deadfreight and demurrage) by the terms of the Bill of Lading,* the terms of which (in full or in extract) are found on the reverse side hereof [emphasis added]."

Since on issue of the Itel Bill of Lading it ceases to be governing contract of carriage, it cannot be the document referred to in Article X(a).

34. Consequently, the booking note can in no sense be described as a bill of lading or similar document of title and nor would it be treated as being such for the purposes of Article X(a), the more so when there is a bill of lading (the Itel Bill of Lading) and one which the Booking Note expressly provides shall superced the Booking Note.

Whether the effect of Clause 2, the General Paramount Clause, of the Itel Bill of Lading would be effective to incoporate the Japanese Carriage of Goods by Sea Act enacting the Hague Rules or the Hague Rules Convention itself.

35. The General Paramount Clause provides in the first place for the Hague Rules as enacted in the country of shipment to apply to the contract. The Japanese Carriage of Goods by Sea Act satisfies this requirement, as it enacts the Hague Rules in the country of shipment. This is the end of the inquiry.

36. The second sentence of the General Paramount Clause goes on to deal with the situation where no such enactment is in force in the country of shipment. That is not the case here and an English Court would therefore not be concerned with the second sentence.

37. If an English Court were required to construe the second sentence, it would read it in its ordinary sense:

(1) It is premised on there being no enactment of the Hague Rules in force in the country of shipment.

(2) It then goes on to stipulate that in such circumstances the legislation of the country of destination shall apply, but if no such enactments are compulsorily applicable, then the terms of the Convention apply.

38. Thus the reference to enactments being compulsorily applicable in the second sentence are to enactments in the country of destination. The second sentence is only concerned with the situation where there is no enacting legislation in the country of shipment.

/s/ M. J. Wisdom

Sworn by the above named deponent
at (illegible)—
in the City of London
This 20th day of December 1995

Before me

/s/ D. J. Mossby
D. J. Mossby
Solicitor

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action Number: CV490-55

ITEL CONTAINER CORPORATION,
Plaintiff,

vs.

M/V TITAN SCAN, HER ENGINES, BOILERS, ETC,
MODUL CARRIERS A G & CO.
TITAN SCAN SCHIFFAHRTS K., CANDYLINE LTD.
MAMMOET SHIPPING B.V.
and AUTORIDAD PORTUARIA NACIONAL,
Defendants

EXHIBIT

This is the Exhibit marked "MJW 2" referred to in the Affidavit of MARTIN JOHN WISDOM.

Sworn this 20th day of December 1995.
Before me

/s/ D. J. Mossby
D. J. MOSSBY
Solicitor

MJW 2

COURT OF APPEAL

Dec. 10 and 11, 1990

HELLENIC STEEL CO. AND OTHERS

v.

SVOLAMAR SHIPPING CO. LTD. AND OTHERS

(THE "KOMNINOS S")

Before Lord Justice LLOYD,
Lord Justice NOURSE and
Lord Justice BINGHAM

Carriage by sea—Limitation of liability—Damage to cargo—Proper law of contract—Cargo found to be damaged on discharge—Whether vessel unseaworthy—Whether proper law of contract English or Greek—Whether carriers entitled to limit liability.

The plaintiffs' cargo of steel coils was shipped in apparent good order and condition on board the defendants' vessel *Komninos S* at Thessaloniki, Greece for carriage to Ravenna and Ancona.

On the previous voyage *Komninos S* had carried 2500 tonnes of marine salt from Spain to Thessaloniki. She arrived there on Mar. 3, 1987 and discharge of the salt was completed on Mar. 10, 1987. The holds were then cleaned first with sea water and then with fresh water.

Loading of the steel cargo commenced on Mar. 11, 1987. The weather was very cold, the temperature falling to —7 deg. C. The coils were brought alongside the vessel on open trucks. Loading was completed on Mar. 13, 1987 and the hatches were closed.

On the way to Ravenna the vessel encountered fairly heavy weather on Mar. 14, 15 and 16, 1987. The master did not ventilate the cargo and on discharge at Ravenna the Ravenna carge was found to have been damaged by corrosion but no claims were made on the owners in respect of the Ancona consignment of steel coils.

The possible causes of the damage to the steel coils were (a) water introduced with the cargo; (b) condensation; (c) seawater entering the cargo spaces and (d) failure to pump the bilges.

The plaintiffs claimed damages alleging that the vessel was unseaworthy and that the defendants acted negligently.

The principle issues of law were whether the proper law of the contract was English or Greek: if English whether the Hague-Visby Rules applied; and if not whether the defendants could rely on the exclusion clauses in the bills of lading to exclude or limit their liability.

——— *Held*, by Q.B. (Com. Ct.) (LEGGATT, J.), that (1) there was very little water carried on board the ship in the coils: when the hatches were closed the mass of the coils caused the temperature of the warmer entrapped air to fall below its dewpoint with the result that moisture condensed on to the exposed surfaces of the coils causing rust; the moisture ran off the coils onto the tank tops and due to the trim of the vessel by the stern, the resulting water concentrated in the after end of each hold; that water could collect in this way must have been due to a failure to pump out the bilges; and the rate of corrosion of the steel coils was considerably increased by the presence of salt left there by insufficient cleaning of the holds;

(2) the effective causes of the damage were the failure to clean the holds sufficently and the failure to pump the bilges; in both omissions the master and crew were negligent and both rendered the vessel unseaworthy by rendering her unfit to carry the cargo of steel coils; the extent of the damage was increased by the fact that the receivers did not immediately open up and deal with the cargo;

(3) the bills of lading contained no express choice of law but the facts, that the contract was made in Greece between Greek shippers and Greek managers to carry Greek steel from Greece to Italy for freight payable in Greek currency, indicated that Greek law was the proper law of the contract;

(4) under Greek law the exemption clauses did not apply; to escape liability the defendants had to bring themselves within exception of perils of the sea or act of shipper; although some of the damage was caused by the receivers' failure to deal immediately with the goods there was no evidence of the amount of damage so caused and 5 per cent would be deducted from the total damages recoverable under this head;

(5) the applicatiton of foreign limitation law was governed by the Foreign Limitation Periods Act, 1984 ss. 1 and 2: under Greek law the plaintiffs' claims were time barred but it would constitute undue hardship if the plaintiffs were prevented from pursuing their claim by an incident of foreign law by which the parties did not realize that their contract was governed: that hardship outweighed any suffered by the defendants by reason of the plaintiffs being able to take advantage of Greek law which excluded reliance on exemption clauses; by virtue of the Act Greek rules of limitation conflicted with public policy and did not apply; the plaintiffs' claims succeeded.

The defendants appealed.

———*Held*, by C.A. (LLOYD, NOURSE and BINGHAM, L.JJ.), that (1) the parties intended their contracts to be governed by the law of the forum where disputes were to be tried; there were no indications which displaced this inference and the parties, by virture of cl. 24 of the bill of lading (which provided inter alia that all disputes should be referred to British Courts) intended English law to govern their contracts (see p. 376, col. 1, p. 377, col. 2; p. 378, col. 1);

(2) Greece was not a contracting state to the Hague-Visby Rules; the bills of lading were not issued in a contracting state and the carriage was not from a port in a contracting state and art. X(a) and (b) of the Hague-Visby Rules had no application; and it was impossible to conclude that the words "All disputes to be referred to British Courts" amounted to a provision that the legislation of the United Kingdom giving effect to the Rules should govern the contract (*see* p. 376, col. 2; p. 377, col. 1);

(3) the Hague-Visby Rules were not incorporated and the shipowners were entitled to rely on the exemption clauses in the bill of lading; the appeal would be allowed (*see* p. 377, col. 1; p. 378, col. 1);

(4) if the proper law of the contract was Greek, the exemption clauses would have been void in Greek law and the cargo-owners would have been entitled to recover (*see* p. 377, cols. 1 and 2; p. 378, col. 1).

The following cases were referred to in the judgment:

Amin Rasheed Shipping Corporattion v. Kuwait Insurance Co., (H.L.) [1983] 2 Lloyd's Rep. 365; [1984] A.C. 50:

Compagnie D'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A., [1970] 2 Lloyd's Rep. 99; [1971] A.C. 572;

Coast Lines Ltd. v. Hudig & Veder Chartering N.V., [1972] 1 Lloyd's Rep. 53; [1972] 2 Q.B. 34.

This was an appeal by the defendants Svolamar Shipping Co. Ltd. the owners of the vessel *Komninos S* from

the decision of Mr. Justice Leggatt ([1990] 1 Lloyd's Rep. 541) given in favour of the plaintiffs Hellenic Steel Co. the owners of a cargo of steel. Forsidera S.p.A., the endorsees of the bill of lading and others and holding that the cargo-owers were entitled to claim damages from the defendants for damage caused to their cargo while on board the defendants' vessel.

Mr. Richard Aikens, Q.C. and Mr. David Garland (instructed by Messrs. Norton Rose) for the defendants Mr. Michael Collins, Q.C. and Mr. Giles Caldin (instructed by Messrs. Wm. A. Merrick & Co), for plaintiffs.

The further facts are stated in the judgment of Lord Justice Bingram.

Judgment was reversed.

Thursday Dec. 20, 1990

JUDGMENT

Lord Justice BINGHAM: This appeal concerns a cargo of steel coils which belonged to the plaintiffs in the action ("the cargo-owners"). It was shipped aboard the defendant shipowners' vessel *Komninos S* at Thessaloniki in March, 1987 and carried to Ravenna under contracts of carriage contained in or evidenced by two bills of lading. The vessel reached Ravenna on Mar. 18 and discharge was completed on the 23rd. After discharge the cargo was found to have been seriously damaged by water.

In February and March, 1988 cargo insurers, having failed to obtain compensation, sought from the shipowners a three-month extension of time to issue proceedings. They treated time as due to expire on Mar. 18, 1988 and threatened the issue of proceedings in the United Kingdom if an extension were not granted. An extension of three

months starting from Mar. 18 was granted by the ship-owners and their P and I Club without prejudice to liability. The parties were unable to settle their differences and on June 16, 1988, just before expiry of the three-month extension, the cargo-owners' solicitors issued a writ in the High Court, claiming damages in breach of contract and duty, bailment and negligence. Application was in due course made and granted to serve the writ on the ship-owners in Cyprus, where the ship-owners are incorporated, the grounds that the cargo-owners were claiming damages for breach of a contract which contained a term to the effect that the High Court should have jurisdiction to hear and determine any action in respect of the contract (R.S.C., O. 11, r. 1(1)(*d*)(iv)). The shipowners were duly served.

The cargo-owners' points of claim pleaded a claim in standard form for damages amounting to a little over U.S. $200,000 and interest. The shipowners' points of defence denied the claim, put the damage to the cargo in issue and relied on two exemption clauses in the bills of lading (cll. 8 and 20). A month or so before the trial the cargo-owners served points of reply. In these they pleaded that the proper law of the contracts of carriage was Greek and that under Greek law the exemption clauses on which the shipowners relied were void. Alternatively, the cargo-owners pleaded that the proper law of the contracts of carriage was English, and so included the Hague-Visby Rules, art. III, r. 8 of which rendered void the exemption clauses on which the shipowners relied. The shipowners rejoined, pleading (among other things) that the proper law of the contracts was not Greek but English, that the Hague-Visby Rules were not incorporated, that the exemption clauses were effective to protect the shipowners and that if Greek law did apply the cargo-owners' claim had become time barred by the passage of a year after discharge without service of proceedings.

The action was heard by Mr. Justice Leggatt in Novembeor 1989 and in a judgment handed down on Dec. 20, 1989 (see [1990] 1 Lloyd's Rep. 541) he found for the cargo-owners and awarded damages (in Italian lira) of about £140,000 including interest. He found that the cargo had been damaged as a result of the shipowners' failure to clean the holds adequately before the voyage and to pump the bilges during the voyage, both of which omissions were negligent and rendered the vessel unseaworthy. These conclusions have not been challenged on appeal and I need say no more about them. The Judge also held that the cargo damage had been increased as a result of the receivers' failure to deal with the cargo promptly, on which score he reduced the cargo-owners' damages by 5 per cent, and that the damaged cargo had no scrap value; these fiindings have given rise to subsidiary issues on the appeal.

The main legal issues before the Judge and before us concerned determination of the proper law of the contracts of carriage and the consequences of that detemination. The Judge's ruling central to this appeal were there:

(1) The proper law of the contracts was Greek, being the system of law with which the transaction had its closest and most real connection: [1990] 1 Lloyd's Rep. 541 at p. 544, col. 2.

(2) Under Greek law the exemption clauses in the bills of lading were void, and so did not protect the shipowners; ibid. at p. 544, col. 2.

(3) Under Greek law the cargo-owners' claim was time barred, but the Euglish Court was not obliged to and would not apply the Greek time bar because its application would cause undue hardship and so conflict with English public policy; ibid. at p. 545, col. 1.

(4) If, contrary to his ruling (1), English law was the proper law of the contracts, the Hague-Visby Rules were

not incorporated, and the shipowners were entitled to rely on the exemption clauses; ibid. at p. 545, col. 2.

(5) If, contrary to his rulings (1) and (4), English law was the proper law of the contracts and the Hague-Visby Rulese were incorporated, the shipowners could not rely on the exemption clauses because of art. III, r. 8 of those Rules; ibid. at p. 546 col. 2.

Ruling (2) was not in issue before the Judge and has been common ground before us. It has also been common ground throughout that art. 148 of the Greek Code had the effect of barring the cargo-owners' claim if proceedings were not served within one year of the cargo's discharge, such period being incapable of extension by agreement. With those exceptions the Judge's ruling were and remain contentious.

The proper law of the contracts

Neither party challenged the correctness of r. 180 in Dicey and Morris. The Conflict of Laws (11th ed., vol. 2, at p. 1161):

> The term "proper law of a contract" means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

Nor was it suggested that this was a case in which the partes had in terms expressed their intention as to the law which should govern the contracts.

Mr. Richard Aikens, Q.C. for the shipowners submitted that this case fell within sub-r. 2 of Dicey and Morris' r. 180 (ibid., p. 1182):

> When the intention of the parties to a contract with regard to the law governing the contract is not ex-

> pressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.

In submitting that the parties' inferred intention was that English law should govern the contracts. Mr. Aikens relied first and foremost on cl. 24 of the bills of lading:

> In case any controversies arise with respect to the construction of the foregoing terms the English text alone to be conclusive. All dispute[s] to be referred to British Courts.

This, it was submitted, should be understood as an agreement to refer disputes to English Courts and there was nothing to displace the ordinary inference that the parties intended the substance of the contracts to be governed by the law of the chosen forum. This submisison was reinforced by reference to: (1) cl. 17 of the bills of lading, which provided:

> General Average to be adjusted according to York-Antwerp Rules of 1950. The Adjustment shall take place in London and [it] shall be binding for both shippers and consignees. The vessel's value to be ascertained in London shall be the standard for the average adjustment. The General Average deposits and the expenses to be distributed according to the same principles . . . shall be fixed at London and in £ Sterling or in any other currency at owners option the same as any further contribution resulting therefrom shall be payable in £ Sterling or in any other currency at owners' option . . .

(2) cl. 8 of the bills of lading. which referred to "Act of God", an English law expression; (3) cl. 20, which set a limitation in sterling on claims per package or per tonne; (4) cl. 22, which set a limitation in sterling on claims for valuable cargo.

It was further submitted, in reliance on observations of Lord Denning, M.R. in *Coast Lines Ltd. v. Hudig & Veder Chartering N.V.* [1972] 1 Lloyd's Rep. 53; [1972] 2 Q.B. 34 that since cll. 8 and 20, the exemption clauses, were void in Greek law and valid in English law (apart from the Hague-Visby Rules), the parties should be taken to have intended the contracts to be governed by English law. Mr. Aikens did not, I think, suggest that these additional references on their own could have supported the inference that English law was intended by the parties to be the proper law, and he acknowledged that "Act of God" had become an international rather than an English term of art following its incorporation in the Hague Rules in 1921-1922, but given the terms of cl. 24 he submitted that the inference was clear.

Mr. Michael Collins, Q.C. for the cargo-owners resisted this submission. The reference to "British Courts" in cl. 24 was, he argued, equivocal, since it would cover Courts in Scotland and Northern Ireland, and in colonies such as Hong Kong, Gibraltar and the Falkland Islands, as well as England. The learned Judge accepted that the reference to "British Courts" was equivocal: [1990] 1 Lloyd's Rep. 541 at p. 544, col. 1.

Mr. Collins submitted that no inference could be drawn as to the parties' intended choice of law and that accordingly the case was one to which Dicey and Morris' sub-r. 3 to r. 180 applied (ibid. at p. 1190).

> When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection.

Mr. Collins pointed out that there is some overlap between the processes envisaged by sub-rr. 2 and 3, since the process of construction involved in the application of

sub-r. 2 necessarily involves (like any other process of construction) consideration of all the surrounding circumstances, which is the essential basis of a decision under sub-r. 3. This is true, and has the formidable support of Lord Wilberforce (*Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.*, [1983] 2 Lloyd's Rep. 365 at p. 373; [1984] A.C. 50 at p. 69). There is nonetheless a clear difference in the purpose for which the surrounding circumstances are considered under the two sub-rules. Under sub-r. 2 it is to ascertain the parties' contractual intention (meaning their actual, not their imputed, intention: what they would have said if asked at the time). Under sub-r. 3 it is to determine objectively and irrespective of the parties' intention, with which system of law the transaction has its closest and most real connection. This involves the application of a rule of law, not a process of contractual construction. It is doubtless no accident that this same dichotomy is reproduced in the Rome Convention, scheduled to the Contracts (Applicable Law) Act, 1990 but not yet in force.

Applying sub-r. 3, Mr. Collins submitted that the system of law with which the transaction had its closest and most real connection was that of Greece. That was the place where the contracts were made, where the vessel was managed, where the cargo came from, where the cargo was shipped. That was the nationality of the managers and the shipers. There was provision in the booking note that freight should be paid in Greek currency in Greece at rates of exchange prevailing in Greece (but these provisions did not appear in the bills of lading and cannot, I think, have affected cargo-owners other than the shippers). These features, Mr. Collins submitted, heavily outweighed the non-Greek features of the transaction: the Cypriot nationality of the shipowners, the Panamanian flag of the vessel, the Italian port of discharge, the provision for general average adjustment in London, the references to sterling. United States dollars and Deutschmarks in the bills

of lading and the choice of British Courts to resolve disputes. The Judge accepted this argument: ibid. at p. 544, col. 1.

The first question is whether the reference to "British Courts" in cl. 24 was, as the cargo-owners submitted and the Judge held, equivocal. Mr. Collins was doubtless correct in describing the Courts of British colonial dependencies as "British", and of course one is aware of the resentment understandably caused by those who, from ignorance or arrogance, treat "British" as a synonym for "English" or "English" as a synonym for "British". But we are here construing an international maritime contract to ascertain what, if any, intention should be attributed to the parties to it. Whatever the constitutional niceties, it seems to me altogether far-fetched, in truth a lawyer's point, to suppose that the parties can have meant or intended to embrace the Courts of British dependencies overseas. I intend no disrespect at all to the highly distinguished Judges who sit in Scotland and Northern Ireland when I say, further, that it is scarcely less far-fetched to suppose that the parties can have meant or intended to embrace those Courts. It is widely known that the Commercial Court and the Admiralty Court, both parts of the High Court, deal on a daily basis with a wide range of international maritime business, much if not most of it referred by agreement to English law or jurisdiction. No doubt for historical and geographical reasons, no other Court in the United Kingdom enjoys that reputation or dispatches that business. It would, in this class of contract between foreigners, be as unusual to find an express choice of a Scots or Northern Irish forum as it would to find agreement for general average adjustment in Edinburgh or Belfast rather than (as expressly agreed here) London. I feel as little doubt on this point as the cargo-owners' solicitors can have felt when they sought and obtained leave to serve out on the basis of a contract which provided that the High Court should have jurisdiction. While I respect the Judge's view that the reference in these bills was equivocal, I cannot share it.

Both sides made reference to the important House of Lords decision in *Compagnie D'Armement Maritime SA v. Compagnie Tunisienne de Navigation S.A.* [1970] 2 Lloyd's Rep. 99: [171] A.C. 572, the cargo-owners for the proposition that a choice of forum is not conclusive as to the proper law, the shipowners for the proposition that a choice of forum, if not conclusive as to the proper law, is a very strong pointer. It is necessary to consider the case in a little detail.

The case arose out of a contract for the carriage by sea of a large quantity of oil from one port in Tunisia to another in instalments during the last three quarters of 1967. The shippers were Tunisian, the carriers French. The carriers owned or controlled five French flag tankers and it was contemplated by the parties at the time of contract that vessels owned by the French carriers would be used, at least primarily, to carry the oil in something between a dozen shipments. The contract was negotiated in the French language in Paris between the presidents of the two companies at a meeting arranged by French shipbrokers engaged by the Tunisian shippers. The contract was recorded on an English language form of single voy age tanker charter-party. Since the contract was for a series of shipments over a period and was not for the charter of any vessel the form was not very apt. The form as executed did, however, contain the following among other clauses:

> 13. The contract shall be governed by the laws of the flag of the vessel carrying the goods . . .
>
> 18. Any dispute arising during execution of this charterparty shall be settled in London, owners and charterers each appointing an arbitrator . . .
>
> 28. . . . Shipments to be effected in tonnage owned, controlled or chartered by the Compagnie d'Armement Maritime S.A. . . .

After six shipments, performed by vessels of five nationalities (only one of them French), the contract broke down. Arbitrators were appointed and on a preliminary issue held the proper law of the contract to be French. Mr. Justice Megaw, on a special case, agreed with the arbitrators, holding that in the circumstances and on the arbitrators' findings cl. 13 amounted to an express choice of French law. The Court of Appeal reversed his decision, on the ground that no meaning could properly be given to cl. 13 in the circumstances and that the choice of London arbitration in cl. 18 was conclusive in favour of English law as the proper law.

On appeal by the French carriers the House of Lords unanimously held that the proper law of the contract was French. A majority of the House (Lord Morris of Borth-y-Gest, Viscount Dilhorne and Lord Diplock) agreed with Mr. Justice Megaw that in the circumstances cl. 13 amounted to an express choice of the law of the French carrier's vessels. Lord Morris and Lord Diplock also held that cl. 13, even if not in itself effective as a choice of law, was effective to negative any inference that might otherwise be drawn from cl. 18 as to choice of law. The minority (Lord Reid and Lord Wilberforce) did not construe cl. 13 as an express choice of law, but regarded French as the system of law with which the transaction had its closest connection. The connection of the transaction with France was, indeed, very close and the shippers appear to have accepted that if the House were free to apply the closest connection test the proper law would be French (per Lord Reid at p. 103, col. 1; p. 584C).

This case is undoubted authority for the proposition that choice of an arbitral forum is not determinative of the proper law. This must indeed be so, since so long as the Court is concerned with ascertaining intention it cannot be bound by any rule of law to reach any given conclusion as to what the parties intended, and when it turns to consider the closest connection under sub-r. 3 it must

consider and weigh all relevant features of the transaction and not give preponderant weight to some features to the exclusion of others. Nonetheless, while rejecting the somewhat absolutist and doctrinaire approach of the Court of Appeal, the House did make plain the significance of choice of forum in ascertaining the parties' intentions. Lord Reid described the choice of an English arbitral form as "an important factor and in many cases it may be the decisive factor" (at p. 103, cols. 1 and 2; p. 584E), Lord Morris said at p. 107, col. 2; p. 590G:

> The circumstance that parties agree that any differences are to be settled by arbitration in a certain country may and very likely will lead to an inference that they intend the law of that country to apply.

Lord Wilberforce said at p. 111, col. 2; p. 596B, D:

> . . . That the selection of a certain place for arbitration and, by inference, of nationals or residents of that place as arbitrators, is an indication that the parties intended the law of that place to govern is a sound general rule . . . So, unless otherwise constrained, I would regard the clause as a weighty indication, but one which may yield to others.

Lord Diplock said:

> The fact that they have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar.

He emphasized, as Lords Reid, Morris and Wilberforce had also done, that this was no more than an inference.

But he also emphasized at p. 120, col. 2; p. 609E:

> . . . I do not wish to throw any doubt upon the proposition that an arbitration clause is generally intended by the parties to operate as a choice of the proper law of the contract as well as the curial law and should be so construed unless there are compelling indications to the contrary in the other terms of the contract or the surrounding circumstances of the transaction.

If, contrary to his submission, cl. 24 of the bills of lading were to be understood as referring to English Courts, Mr. Collins argued that the other features of the contracts (listed above) were so compelling as to outweigh any inference which might otherwise be drawn from the choice of forum. The learned Judge did not consider the matter on this assumption and we do not know what his conclusion was or would have been. In seeking, under sub-r. 2, to infer the intentions of the parties from the terms of the contract set in its factual matrix, I would (as the authority just examined indicates one should) infer that the parties intended their contracts to be governed by the law of the forum where disputes were to be tried unless there were strong indications that they did not intend or may not have intended this result. I find no indication here which begins to displace the prima facie inference. If cl. 24 did not exist, it would (I think) be impossible to draw any inference as to the parties intentions. The sub-r. 3 test would then have to be applied, and in the absence of any substantial connection with the English system of law. I would accept that the Greek system of law is that with which the transaction had its closest and most real connection. As it is, however, cl. 24 did exist, and sub-rule 2 leads me to the conclusion that these parties intended their contracts to be governed by English law. I am vividly aware that this Court must be very slow to differ from the conclusion of an experienced commercial Judge on a matter of this kind, but the question has been fully argued and I am persuaded that he was wrong.

Incorporation of the Hague-Visby Rules

If, contrary to his submission, English law was the proper law of these contracts, Mr. Collins argued that English law included the Hague-Visby Rules and accordingly invalidated the exempton clauses on which the shipowners relied. The Judge rejected this submission (which on his primary conclusion did not of course arise) and I agree with him.

The Hague-Visby Rules were given the force of law by the Carriage of Goods by Sea Act, 1971. By virtue of the Act and the Rules themselves the Rules apply (1):

> . . . in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom [s. 1(3) of the Act].

(2) without prejudice to art. X(c) of the Rules—

> . . . in relation to any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract [s. 1(6)(a) of the Act]

or if such express provision is contained in a non-negotiable receipt (s. 1(6)(b) of the Act; and (3):

> . . . to every bill of lading relating to the carriage of goods between ports in two different States if (a) the bill of lading is issued in a contracting State, or (b) the carriage is from a port in a contracting State, or (c) the contract contained in or evidence by the bill of lading provided that these Rules or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person [art. X of the Rules].

Since the shipment was from Greece, s. 1(3) plainly had no application. It was not suggested that these bills

expressly provided that the Rules should govern the contract so as to trigger the application of s. 1(6). Greece was not a contracting state, so the bills of lading were not issued in a contracting state and the carnage was not from a port in a contracting state, and art. X(a) and (b) accordingly had no application. There was thus no question of the United Kingdom legislation applying automatically. It had to be incorporated. So the argument centred on art. X(c). Here again Mr. Collins did not, I think, argue that the bills provided that the Rules should govern the contracts. The question was whether, assuming the choice of an English forum showed an intention that English law should govern the contracts, the bills of lading "provided" that the legislation of the United Kingdom giving effect to the Rules should govern the contracts. Mr. Collins submitted that this test was satisfied on the facts here. Mr. Aikens that it was not.

The French text (which uses the expressions "prevoit" and "legislation") gives no assistance. We were referred to no relevant English authority. Nor had the researches of Counsel unearthed any foreign authority, which if it existed would be of obvious importance in interpreting an international convention. For this purpose one must eschew any approach to interpretation peculiar to this jurisdiction. In this context it is relevant to bear in mind that in many civil law systems, as I think, much stricter rules govern incorporation by reference than are accepted here. One must also, of course, bear in mind that these bills are negotiable instruments which may bind parties remote from the original contracts. Interpreting art. X(c) as best I can, I find it impossible to conclude that "All dispute[s] to be referred to British Courts" amounted to a provision that the legislation of the United Kingdom giving effect to the Rules should govern the contract. The cargo-owners' insurers evidently thought otherwise or there would have been no need to seek an extension. But I see no escape from this conclusion.

The consequence of concluding, as I do, that the Hague-Visby rules were not incorporated is that the exemption clauses in the bills of lading protect the shipowners and the cargo-owners are unable to recover. Given the undoubted negligence of the shipowners' servants or agents, this is at first blush an unattractive result. I do not, however, think that in a purely commercial dispute of this kind one should strive to reflect a superficial view of the merits. The fact is that the cargo-owners contracted on terms which expressly relieved the shipowners, their master and crew, of responsibility for any act, error, neglect or default in the management, stowage, navigation or preparation of the vessel or otherwise. This judgment gives effect, for better or worse, to what the parties expressly agreed. The result is that I would allow the appeal, set aside the Judge's order and enter judgment for the shipowners. The issues on quantum do not therefore arise and we have not heard argument upon them.

Greek proper law

Had I, like the Judge, concluded that the proper law of these contracts was Greek. I would have shared his conclusion that, the exemption clauses being void in Greek law, the cargo-owners were entitled to recover. I shall give my reason very summarily.

Article 148 of the Greek Code provides that—

> . . . the right to compensaton for partial loss or damage of the shipped cargo is extinguished one year after its (the cargo's) delivery.

This period cannot be extended by consent. Section 1 of the Foreign Limitation Periods Act, 1984 requires this Court, if determining this contractual dispute according to the Greek proper law, to apply the Greek limitation period. But s. 2 of the Act provides:

> (1) In any case in which the application of section 1 above would to any extent conflict (whether under

> subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.
>
> (2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

The learned Judge disapplied the Greek limitation period, in reliance on section 2(1) and (2). He said (ibid., at p. 545, col. 1):

> In these circumstances it would in my judgment constitute a real and undue hardship if the plaintiffs were to be denied the opportunity of pursuing their claim by an incident of foreign law by which the parties did not realise that their contract was governed.

Mr. Aikens challenged this conclusion, but I agree with it and in any event regard it as a conclusion to which the Judge could properly come.

Mr. Aikens also argued that even if the Greek limitation period were properly disapplied on grounds of undue hardship, the effect was to reinstate the common law position. Thus, he argued, the Greek limitation period was substantive and the English Court would give effect to it unless it conflicted with English public policy which (in the absence of any common law provision deeming undue hardship to constitute a conflict with English public policy) it did not. I would for my part incline to accept that the Greek limitation rule is one of substance not procedure, since it speaks of extinguishing a right, but I am quite unable to accept that a foreign limitation period, once disapplied under s. 2 (whether on grounds of undue hardship or other conflict with public policy), can spring up afresh and bar the plaintiff's claim. Whether in

that situation no limitation period applies, or whether the English Court will apply its domestic rules of limitation, it is unnecessary to decide, although the latter alternative seems to me clearly preferable. Since the cargo-owners issued their proceedings within the English limitation period and within the period granted by the shipowners, and since the cargo-owners were entitled to recover if the exemption clause were disregarded, the result of applying Greek proper law is, as the Judge said, that the cargo-owners recover.

Lord Justice NOURSE: For the reasons given by Lord Justice Bingham, I agree that the proper law of the contracts created by the bills of lading was English law and that the Hague-Visby Rules were not incorporated therein. I would allow the appeal accordingly. I also agree with the views expressed by Lord Justice Bingham as to the further questions which would have arisen if the proper law of the contracts had been Greek and not English law.

Lord Justice LLOYD: I also agree.

[*Order: Appeal allowed; cross-appeal dismissed; appellants to have their costs in this court and two-thirds of their costs in the court below; application for leave to appeal to the House of Lords refused.*]

QUEEN'S BENCH DIVISION
(COMMERCIAL COURT)

Nov. 22 and 23, 1989

HELLENIC STEEL CO. AND OTHERS

v.

SVOLAMAR SHIPPING CO. LTD.
SVOLAMAR SHIPPING CO. LTD. AND OTHERS

(THE "KOMNINOS S")

Before Mr. Justice LEGGATT

Carriage by sea — Limitation of liability — Damage to cargo — Proper law of contract — Cargo found to be damaged on discharge —Whether vessel unseaworthy —Whether law of contract English or Greek— Whether carriers entitled to limit liability.

The plaintiffs' cargo of steel coils was shipped in apparent good order and condition on board the defendants' vessel *Komninos S* at Thessaloniki Greece for carriage to Ravenna ad Ancona.

On the previous voyage *Komninos S* had carried 2500 tonnes of marine salt from Spain to Thessaloniki. She arrived there on Mar. 3, 1987 and discharge of the salt was completed on Mar. 10, 1987. The holds were then cleaned first with sea water and then with fresh water.

Loading of the steel cargo commenced on Mar. 11, 1987. The weather was very cold, the temperature falling to -7 deg. C. The coils were brought alongside the vessel on open trucks. Loading was completed on Mar. 13, 1987 and the hatches were closed.

On the way to Ravenna the vessel encountered fairly heavy weather on Mar. 14, 15 and 16, 1987. The master did not ventilate the cargo and on discharge at Ravenna the Ravenna cargo was found to have been damaged by corosion but no claims were made on the owners in respect of the Ancona consignment of steel coils.

The possible causes of the damage to the steel coils were (a) water introduced with the cargo; (b) condensation; (c) seawater entering the cargo spaces and (d) failure to pump the bilges.

The plaintiffs claimed damages alleging that the vessel was unseaworthy and that the defendants acted negligently.

The principle issues of law were whether the proper law of the contract was English or Greek; if English whether the Hague-Visby Rules applied; and if not whether the defendants could rely on the exclusion clauses in the bills of lading to exclude or limit their liability.

————*Held*, by Q.B. (Com. Ct.) (LEGGATT, J), that (1) there was very little water carried on board the ship in the coils: when the hatches were closed the mass of the coils caused the temperature of the warmer entrapped air to fall below its dewpoint with the result that moisture condensed on to the exposed surfaces of the coils causing rust; the moisture ran off the coils onto the tank tops and due to the trim of the vessel by the stern, the resulting water concentrated in the after end of each hold; that water could collect in this way must have been due to a failure to pump out the bilges; and the rate of corrosion of the steel coils was considerably increased by the presence of salt left there by insufficient cleaning of the holds (*see* p. 543, col. 2);

(2) the effective causes of the damage were the failure to clean the holds sufficiently and the failure to pump the bilges; in both omissions the master and crew were negligent and both rendered the vessel unseaworthy by rendering her unfit to carry the cargo of steel coils; the extent

of the damages was increased by the fact that the receivers did not immediately open up and deal with the cargo (*see* p. 543, col. 2);

(3) the bills of lading contained no express choice of law but the facts, that the contract was made in Greece between Greek shippers and Greek managers to carry Greek steel from Greece to Italy for freight payable in Greek currency, indicated that Greek law was the proper law of the contract (*see* p. 544, cols. 1 and 2);

(4) under Greek law the exemption clauses did not apply; to escape liability the defendants had to bring themselves within exception of perils of the sea or act of shipper; although some of the damage was caused by the receivers failure to deal immediately with the goods there was no evidence of the amount of damage so caused and 5 per cent, would be deducted from the total damages recoverable under this head (*see* p. 544, col. 2);

(5) the application of foreign limitation law was governed by the Foreign Limitation Periods Act, 1984 ss. 1 and 2; under Greek law the plaintiffs' claims were time barred but it would constitute undue hardship if the plaintiffs were prevented from pursuing their claim by an incident of foreign law by which the parties did not realize that their contract was governed; that hardship outweighed any suffered by the defendants by reason of the plaintiffs being able to take advantage of Greek law which excluded reliance on exemption clauses; by virtue of the Act Greek rules of limitation conflicted with public policy and did not apply; the plaintiffs' claims succeeded (*see* p. 545, col. 1; p. 546, col. 2; p. 547, col. 1).

The following cases were referred to in the judgment:

Coast Lines Ltd. v. Hudig and Veder Chartering N.V., (C.A.) [1972] 1 Lloyd's Rep. 53; [1972] 2 Q.B. 34;

Gilroy Sons & Co. v. Price & Co., (H.L.) [1893] A.C. 56;

Ismail v. Polish Ocean Lines, (C.A.) [1976] 1 Lloyd's Rep. 489;

Morviken, The (H.L.) [1983] 1 Lloyd's Rep. 1; [1983] 1 A.C. 565;

Nelson v. Nelson Line (Liverpool) (H.L.) [1908] A.C. 16; (C.A.) [1907] 2 K.B. 705;

Pearlmor, The [1904] P. 286;

Price v. Union Lighterage Co., [1904] 1 K.B. 412;

Tattersall v. National Steamship Co., (1884) 12 Q.B.D. 297.

This was an action by the plaintiffs, Hellenic Steel Co., the owners of the cargo of steel, Forsidera S.p.A. the endorsees of the bills of lading, and others claiming damages against the defendants Svolamar Shipping Co. Ltd., the owners of the vessel *Komninos S* for damages caused to their cargo of steel coils while on board the vessel.

Mr. Giles Caldin (instructed by Messrs. Wm. A. Merrick & Co.) for the plaintiffs; Mr. David Garland (instructed by Messrs. Norton Rose) for the defendants.

The further facts are stated in the judgment of Mr. Justice Leggatt.

Judgment was reserved

Wednesday Dec. 20, 1989

JUDGMENT

Mr. Justice LEGGATT: The first plaintiffs, Hellenic Steel Co., claim as owners of a cargo of steel coils shipped aboard a Panamanian vessel called *Komninos S*

at Thessaloniki in Greece. The second plaintiffs. Forsidera S.p.A., were endorsees of the bills of lading, having bought from the first plaintiffs the respective parcels referred to in them. The second plaintiffs in turn sold the cargo under the first bill of lading to the third plaintiffs Ciocca Lamiere S.p.A. The fourth plaintiffs. Seaway S.R.L., acted as agents of the third and fifth plaintiffs, Although the plaintiffs' title to sue had been faintly impugned by the defendants, that argument was rightly not pursued by Mr. Garland on their behalf.

The first defendants, Svolamar Shipping Co. Ltd., were the owners of the vessel, while the second defendant, Mr. Svolakis, who apparently has a controlling interest in the first defendants, was not served and did not appear at the hearing. I shall therefore refer to the first defendants as "the defendants". They admit that upon shipment the cargo was in apparent good order and condition, and was undamaged. Upon discharge the steel coils were suffering from damage from corrosion.

The plaintiffs' claim is made alternatively in contract, bailment and tort. The principal issues of fact concern the cause or causes of damage to the cargo, the seaworthiness of the vessel, and whether the defendants acted negligently or, on the other hand, with due diligence. The principal issues of law are whether the proper law of the contract was Greek or English; and if English, whether the Hague-Visby Rules applied to the carriage; and if not, whether particular clauses of the bills of lading were apt to exclude or limit the defendants' liability.

The only witnesses called at the hearing were experts. This represents a growing fashion in this Court for not calling witnesses of fact, apparently in the belief that it is sufficient for the effect of such evidence to be given in the form of Civil Evidence Act statements. Where, as here, there are issues of fact as to seaworthiness and negligence to be resolved, that is wholly unsatisfactory. I was im-

pressed by both marine experts, particularly by the defendants' expert, Mr. Haile, most of whose evidence I adopt.

Komninos S was built in 1964. She had two cargo holds each comprising a lower hold and a tween deck, and each served by a single hatch, which was closed by means of a single pull MacGregor-type steel hatch cover. The tween deck squares were closed by means of beams and wooden hatch boards, which were probably not in place during the relevant voyage. The vessel had six ventilators of the mustroom type, the intakes of which were considerably above the weather deck, with the result that even when exposed to spray no substantial quantity of water could have entered the vessel's cargo spaces through the ventilator intakes.

While the vessel was in Thessaloniki she was surveyed by the Lloyd's surveyor on Mar. 13, 1987 for renewal of her International Loadline Certificate. That involved examination of the hatches and the watertight integrity of the vessel. At the same time the Cargo Ship Safety Construction certificate was renewed. On Mar. 1, 1987 a condition survey had been carried out by Captain Scountzos on behalf of the vessel's P. and I. club, in the course of which the hatch covers were hose tested and found satisfactory, as was the condition of the holds. At the end of the month the surveyor made a number of recommendations to the owners, none of which affected the vessel's cargoworthiness. I may say that I should be very slow to doubt the validity of certificates given by apparently competent surveyors, in default of any challenge by oral evidence.

On the voyage before the one in question the vessel had carried 2500 tonnes of marine salt in bulk from Spain to Thessaloniki. She arrived there on Mar. 3, 1987 and completed the discharge of the salt on Mar. 10, 1987; No. 1 hold at about noon, and No. 2 hold at about 2 30 p.m. The holds were then cleaned. I accept that there was just enough time to clean the holds, first with sea water and

then with fresh water, and that that is how it was done. But it was not done with sufficient thoroughness to remove all salt residues.

At 8 00 a.m. Mar. 11, 1987 a representative of the plaintiffs viewed the vessel's cargo spaces from the deck and assented to the loading of the steel coils, which commenced at 10 00 a.m. in both holds. The weather was very cold, the temperature falling to –7deg.C. The coils were brought alongside the vessel on open trucks, and the loading was carried out by shore cranes. When it was complete at noon on Mar. 13, 1987, the hatches were closed. Once in the open sea, the sea temperature rose considerably.

On the way to Ravenna the vessel encountered fairly heavy weather on Mar. 14, 15 and 16, 1987, after which it moderated. During the heavy weather the vessel took spray on deck but she was probably not taking heavy seas on deck. The master did not note sea protest. Although the vessel arrived off Ravenna at 6 00 a.m. on Mar. 18, 1987, discharge of the cargo did not begin until 8 00 a.m. on the following day. While the steel coils destined for Ravenna were being unloaded, the receivers noticed that the outer wrappings of many of them had been affected by rust, and that there were signs of water having been present in the holds. The discharge of the cargo was completed at 6 30 p.m. on Mar. 23, 1987. The vessel then sailed for Ancona, which was her other discharge port. No claims have been made upon the owners in respect of the Ancona consignment of steel coils. It is to be noted that whereas the Ravenna coils were stowed in the after end of the lower holds, the Ancona coils were stowed in athwartships rows with their major axes horizontal and in the fore and aft line, standing on a single layer of 6in. x 1in. dunnage laid athwartships. Each coil was protected by being air-tightly wrapped with anti-corrosion paper and masking tape, and further wrapped with a metal cover. Each was secured both internally and externally with strapping bands.

The possible causes of the damage to the steel coils were: (a) water introduced with the cargo; (b) condensation; (c) sea water entering the cargo spaces, and (d) failure to pump the bilges. Such damage could have been exacerbated by; (a) the presence of salt; (b) the trim of the vessel, and (c) delay in dealing with the coils after discharge.

I find that very little water was carried on board the ship in the coils. But when they were loaded into the lower holds they had a temperature below 0 deg. C. When the hatches were closed and the vessel sailed, the mass of the coils caused the temperature of the warmer entrapped air to drop below its dewpoint, with the result that the moisture condensed out of the air on to the exposed surfaces of the coils where it started to cause rust. The moisture ran off the coils on to the tank tops and, due to the trim of the vessel by the stern, the resulting water concentrated in the after end of each hold. There is collected until it was abov the dunnage, thus causing most of the damage to the coils there which is visible from photographs. So it happened that many of the Ravenna coils were ruined, whereas none of the remainder were. That water could collect in this way must have been due to a failure to pump out the bilges. Not to have done so was bad seamanship, since even if it was impossible to sound the bilges, the bilge pumps could have been run until suction was lost. In this way, as Mr. Haile acknowledged, free water in the holds could and should have been disposed of. Cargo sweat, as it is technically known, continued in the lower holds until the equilibrium of temperature was reached. The rate of corrosion of the steel coils was considerably increased by the presence of salt left there by insufficient cleaning of the holds. The effective causes of the damage therefore were the failure to clean the holds sufficiently and the failure to pump the bilges. In both omissions the master and crew were negligent, and both rendered the vessel unseaworthy, in the one case at the outset of the voyage and in the other in the course

of it, by rendering her unfit to convey the cargo of steel coils. The extent of the damage to them was also increased by the fact that they were not opened and dealt with immediately by the receivers. For the damaged coils there is not shown to have been any market as scrap.

The master rightly refrained from ventilating the cargo during the passage from Thessaloniki to Ravenna. Had the weather permitted ventilation to take place during the earlier part of the voyage, the temperature differential between the relatively warm sea air and the steel coils would have tended to cause even more condensation than in fact occurred. In the circumstances it would have made no difference if the ship had been equipped with a hygrometer, assuming that she was not.

The bills of lading contain no express choice of law, but they are in the English language and cl. 24 provides that "All dispute [sic] to be referred to British Courts". Clause 8 refers to the Act of God; cl. 17 provides that the adjustment of General Average deposits "shall be fixed at London and in £ Sterling"; and cll. 20 and 22 provide for the limitation of liability in certain circumstances to amounts expressed in sterling. There are, on the other hand, references to United States dollars as well as German currency. For the defendants Mr. Garland argues that if English law was not the proper law of the contracts evidenced by the bills of lading they have a closer connection with Italy than with Greece because three of the plaintiffs, including those with title to sue as owners of the goods, are Italian and the destination of the goods is more important then the port of loading. He also relied upon *Coastlines Ltd. v. Hudig and Veder Chartering N.V.*, [1972] 1 Lloyd's Rep. 53; [1972] 2 Q.B. 34 for the argument that Greek law is not the proper law because under that law cll. 8 and 20 of the bills of lading, which provide for the exclusion or limitation of liability in certain circumstances, would be void. The argument is that parties should be held to have intended to be bound

by all the terms to which they have expressly agreed. But that can only be a pointer to the proper law, especially since in default of an express choice of law it is not ascertained nowadays by searching for the presumed intention of the parties.

For the plaintiffs Mr. Caldin submits that in default of an express choice of law the Court should identify as the proper law of the contract the system of law with which the transaction had its closest and most real connection. He argues that the reference in the bills of lading to British Courts is ambiguous, and that such references as there are to England or the United Kingdom are outweighed by the factors which point to Greek law as most apposite. Thus the contract was made in Greece between Greek shippers and Greek managers on behalf of the Cypriot owners of a Panamanian vessel to carry Geek steel from Greece to Italy for freight payable in Greece in Greek currency pusuant to Greek exchange control regulations. In my judgment, these factors do predominate over the equivocal reference to British Courts, and other English references, some of which may have been influenced by the use of English as the language of commerce. I accordingly hold that Greek law was the proper law of the contract.

It is common ground that under Greek law the exemption clauses do not apply, and that to escape liability the defendants would have to bring themselves within exceptions of perils of the sea or act of shipper. But although I am satisfied that some of the damage to the steel coils was caused by the receivers' failure to unwrap, unroll and treat them as soon as possible after discharge, there is no evidence of the amount of damage thereby caused. So I can do no more than make a nominal discount of 5 per cent. From the total amount of damages otherwise recoverable under this head. It is also common ground that under Greek law the claims became time barred, even though there was an agreement between the parties for an

extension of time on Mar. 23, 1988. To avoid this result, Mr. Caldin argued that because the agreement for an extension of time was consistent with an implicit choice of the Hague-Visby Rules, the parties must impliedly have agreed to the adoption of the rules by amendment of the bills of lading, or, alternatively, the defendants are estopped from denying that they apply. To these submissions the answers must be that the agreement was not consistent only with an assumption that the rules applied: that even if it had been, the assumption was wrong; that no assumption that the rules may apply can be arrogated into an agreement that they would apply, even if the assumption was wrong; and that estoppel cannot provide a plaintiff with a cause of action he otherwise lacks, as distinct from depriving a defendant of a defence he would otherwise have had.

The plaintiffs submit that the defendants are estopped from asserting the plea of limitation because they extended time in the context of English proceedings, in which agreement for extensions of time are recognized. Indeed, the agreement to extend time may well have been made upon the assumption that the Hague-Visby Rules applied, under which the time limit was capable of consensual extension. Under Greek law it is not possible to extend time in this way and, if it had been, time was only extended until June, 1988, whereas Greek proceedings are only commenced when service is effected, and that did not occur until December, 1988. It would have been useless for the defendants to represent that they would extend time for purposes of Greek law and they did not do so. They are therefore not estopped from relying on the plea of limitation.

The plaintiffs nevertheless invoke ss. 1 and 2(1) and (2) of the Foreign Limitation Periods Act, 1984 which provide that the limitation rules of the proper law are to be applied in actions except to the extent that they conflict with English public policy; and it is declared that

there is a conflict with public policy to the extent that undue hardship would be caused to a party. According to the plaintiffs "undue hardship" would result to them if the defendants were allowed to rely on the time bar after agreeing to an extension of time. It is true that it was not to an extension of time for the purposes of Greek law that the defendants agreed, and it is the plaintiffs who have invoked Greek law. But by agreeing to extend time the defendants plainly intended to vouchsafe the plaintiffs more time in which to bring proceedings against them without being time-barred. Within the time allowed the plaintiffs instituted proceedings in respect of cargo damage such as were contemplated by the parties. In these circumstances it would in my judgment constitute a real and undue hardship if the plaintiffs were to be denied the opportunity of pursuing their claim by an incident of foreign law by which the parties did not realize that their contract was governed. That hardship outweighs any that the defendants might be said to suffer by reason of the plaintiffs being enabled to take advantage of Greek law which excludes reliance on exemption clauses, as do the Hague-Visby Rules. Greek law therefore has the same effect in this context as the rules by which the parties probably assumed that the contract would be governed. It follows that the Greek rules of limitation conflict with public policy, and so do not apply.

I would add that the plaintiffs are not estopped, by virtue of the presence of their representative during loading, from complaining of defects in the condition of the holds on the ground that the representative made no complaint at the time. The plaintiffs' interest in the loading did not go so far as participation in it or assumption of responsibility for it, and that clearly distinguishes this case from *Ismail v. Polish Ocean Lines* [1976] 1 Lloyd's Rep. 489. In any event, the fact that the holds had not been sufficiently cleansed of salt would probably not have been apparent to an observer from the deck.

For these reasons the plaintiffs' claim succeeds, but in case I am wrong that Greek law was the proper law of the contract I must consider also the alternative arguments based on the assumption that English law was the proper law.

If English law were the proper law, the first question would be whether the Hague-Visby Rule applied. That would depend on the operations of art. X(c), which provides that the provisions of the Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

> . . . the contract contained on or evidence by the bill of lading provided that these Rules or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Remarking that the rules "should be given a purposive rather than a narrow literalistic construction" (see per Lord Diplock in *The Morviken*, [1983] 1 Lloyd's Rep. at p. 5, col. 2; [1983] 1 A.C. 565 at p. 572H). Mr. Caldin argued that the contract contained in or evidenced by the bill of lading here provides by implication that the Carriage of Goods by Sea Act, 1971 is to govern the contract. The implication would involve that the contract enables English law to be identified as the law which governs the contract: the Act is part of the English law and thus, the contract provides that it is to be governed by the Act. That is not in my judgment the proper construction of the word "provides"; it is used in the sense of "stipulates" and connotes express provision. It follows that the Hague-Visby Rules do not apply.

In that event, the defendants would rely on cll. 8 and 20 of the bill of lading to exclude or limit their liability. Clause 8 provides (so far as material):

> The shipowners are not to be responsible for loss or damage occasioned by . . . accidents or defect [sic] latent or patent, on beginning of a voyage or at any other time, in Hull, Tackle, Boilers, Machinery, Equipments of Ship or Craft or their appurtenances, any act, error, neglect or default whatsoever of Pilot, Master or Crew, or other Servant of Agent of the Shipowners in the Management, Stowage, Navigation or preparation of the ship or otherwise . . . Sweat, Rust, Decay, effects of Climate . . . .

As it is put in Scrutton on Charterparties, 19th ed. at p. 87:

> The shipowner will be liable in damages for loss *Caused* by unseaworthiness on the voyage, though covered by exceptions, if having an opportunity to repair it he by negligence not covered by exceptions proceeds without repairing it.

The Pearlmoor, [1904] P. 286 is authority, if it were needed, that "sweating" means damage by condensation: so does "sweat". Mr. Caldin argues that "sweat" and "rust" are not excepted when they arise from unseaworthiness, there being no element of neglect. In this case sweat occurred because the cold coils were carried in a relatively warm hold. But in so far as damage by rust was caused by failure to pump the bilges, it was plainly due to the neglect of master or crew in the management or navigation of the ship. Similarly, unfitness through allowing extraneous salt to remain in the holds is excluded by the express reference to neglect in the preparation of the ship. In *Gilroy v. Price* [1893] A.C. 56 an exception from liability for any act, neglect or default whatsoever of the master and crew in the navigation of the ship in the ordinary course of the voyage was held not to relieve the shipowners from liability because the unseaworthiness was present at the time when the vessel started on her voyage, and it was only neglect or default in the course of the voyage that

was exempted. Here neglect or default is exempted, not only in the management and navigation of the ship, but also in her preparation. Even if English law were the governing law, but the Hague-Visby Rules did not apply, the defendants' liability would therefore be excluded by the express terms of the contract.

The first sentence of cl. 20 of the bill of lading provides as follows:

> The Owners not to be responsible for any losses, shortages or injuries which can be covered by insurance.

Mr. Garland rightly concedes that this provision does not exclude liability for negligence: *Price v. Union Lighterage Co.*, [1904] 1 K.B. 412. Nor would it relieve the defendants from damage caused by unseaworthiness: *Nelson v. Nelson Line (Liverpool)* [1907] 1 K.B. 769. In the light of my findings the first sentence of cl. 20 would not avail the defendants, though I decline to hold that, having regard to the implied obligation of seaworthiness, cll. 2 and 20 are to be regarded as ambiguous: cf. *Nelson v. Nelson Line (Liverpool)*, [1908] A.C. 16. The principle applicable is that which I have cited earlier from Scrutton. It is in the circumstances not necessary to decide whether damage such as the plaintiffs incurred in this case is comprehended within the term "injuries", but construing the document contra proferentes, I should be inclined to hold that "injuries" here means personal injuries.

Clause 20 also provides that:

> In all cases of claims for goods incompletely delivered or wholly missing at the port of destination, insofar as the said claims are not excluded by the foregoing exceptions, the price shall be the market price ruling at the port of destination on the day of clearing in of the vessel less the freight and charges saved. The shipowners' responsibility is limited in all

cases to £5 per package or £10 per 1,000 kilos, whichever may be less.

Mr. Caldin argues that the limitation "in all cases" means, in effect, "all such cases", and so is confined by its context to goods "incompletely delivered or wholly missing". In any event, as with other attempts to contract out of liability other than by clear words, clauses limiting the extent of liability will not affect the implied obligation as to seaworthiness. So, in *Tattersall v. National Steamship Co.*, (1884) 12 Q.B.D. 297 the ship had not been properly cleansed before cattle were received on board which in consequence were affected by foot-and-mouth disease. It was held that a clause limiting the defendants' liability would not avail them because it related to the carriage of goods on the voyage and did not affect their liability to provide a ship fit for the reception of the cattle. This part of cl. 20 would therefore not enable the defendants to limit their liability in the present case.

If English law had been the governing law, and the Hague-Visby Rules had applied, the defendants by force of art. III, r. 8, could not have relied on any clauses relieving them from liability in negligence. In the event they could only have argued that the vessel was not unseaworthy and that they were not negligent in relation to the carriage of the steel coils but, on the contrary, exercised due diligence. These pleas are, however, incompatible with my findings. Of more moment is the contention that in breach of art. IV, r. 2(i) which relates to the act or omission of the shipper or owner of the goods, his agent or representative, the receivers of the steel coils failed to unwrap, unroll or treat the cargo as soon as possible after its discharge, causing damage. As with the similar plea made under Greek law, I am satisfied that the contention is valid. But there is no evidence of the amount of damage thereby caused, and had the point been relevant I could have done no more than make a nominal dis-

count of 5 per cent, total amount of damages otherwise recoverable under this head. The defendants' argument that liability was limited by art. IV, r. 5, was mistaken and was rightly abandoned.

As I have indicated, the plaintiffs' claim against the first defendants succeeds under Greek law. I award damages in accordance with the plaintiffs' new reduced calculations, but expressed in the currency in which the loss was incurred, namely Italian lire, and discounted by 5 per cent., as I have indicated.

I acknowledge with gratitude the competence of Mr. Caldin and the burgeoning skills of Mr. Garland.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action Number: CV494-55

ITEL CONTAINER CORPORATION,
Plaintiff,

vs.

M/V TITAN SCAN, HER ENGINES, BOILERS, ETC,
MODUL CARRIERS A G & CO.
TITAN SCAN SCHIFFAHRTS K., CANDYLINE LTD
MAMMOET SHIPPING B.V. and
AUTORIDAD PORTUARIA NACIONAL,
Defendants

EXHIBIT

This is the Exhibit marked "MJW 3" referred to in the Affidavit of MARTIN JOHN WISDOM.

Sworn this 20th day of December 1995.

Before me

/s/ D. J. L. Mossby
D. J. L. MOSSBY
Solicitor

101a

MJW3

VOYAGE CHARTERS

BY

JULIAN COOKE
of Lincoln's Inn, Barrister

TIMOTHY YOUNG
of Gray's Inn, Barrister

ANDREW TAYLOR
London Solicitor, Richards Butler

JOHN D. KIMBALL
New York Attorney, Healy & Baillie

DAVID MARTOWSKI
Partner, Thos. R. Miller & Son

LEROY LAMBERT
New York Attorney, Healy & Baillie

FOREWORD BY THE RT. HON. LORD JUSTICE STAUGHTON

LLP

LONDON NEW YORK HAMBURG HONG KONG

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1993

* * * *

This result, and not that in *The Hollandia*, still applies where shipments are out of non-contracting states for the purposes of the Hague-Visby Rules, unless one of the other stipulations of Article X is satisfied, see below, page 708.

The Hollandia also has no application with regard to statutory rights of limitation by reference to the registered tonnage of the vessel. Such rights of tonnage limitation are distinct from limitation by reference to package or unit or weight of cargo (see Article IV rule 5). An express foreign jurisdiction clause is not rendered null and void even if its practical effect is to impose a tonnage limitation which is less generous than that stipulated by Article IV rule 5: see *The Benarty* [1985] Q.B. 325 and see Article VIII which expressly preserves rights of tonnage limitation.

The fact that English law includes the Carriage of Goods by Sea Act 1971, and gives the Hague-Visby Rules the force of law, does not of itself mean that a bill of lading contract is governed by those Rules simply because it is expressly or impliedly governed by English law, where it is issued neither in a contracting state, nor in respect of cargo loaded in a contracting state: *Hellenic Steel Co. v. Svolamar Shipping Co. (The Komninos S)* [1991] 1 Lloyd's Rep. 370. There must, in such cases, be some specific reference to the Carriage of Goods by Sea Act 1971, or particular Hague-Visby legislation, in the bill of lading if it is intended to cause a bill of lading contract to be governed by the Hague-Visby Rules.

Section 1(3) provides that the provisions of the Rules ". . . shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea . . ." where the port of shipment is within the United Kingdom and section 1(6) provides that the Rules "shall

have the force of law in relation to . . ." any bill of lading expressly providing that the Rules shall govern or any non-negotiable receipt so providing as if it were a bill of lading. The wording of the Act seems to differentiate between the Rules having the force of law ". . . in relation to . . . " and ". . . in relation to and in connection with . . ." the designated voyages and contractual documents. The purpose of differentiating between these different formulations is obscure and is probably mere tautology, just as are, for example, the words "resulting or arising from" in Article IV rule 2 of the Hague-Visby Rules.

It is important always to have in mind the distinction between the contractual incorporation of the Hague or Hague-Visby Rules and the application of the Rules.

> A cargo of machinery was loaded on board the *Antares* in Antwerp for carriage to Mombasa under bills of lading which contained a London arbitration clause. Antwerp was in a contracting state for the purposes of the operation of the Hague-Visby Rules and therefore the Rules were to be given the force of law in England, so far as the carriage was concerned. The cargo was damaged during the voyage. After the expiry of the one-year limitation period stipulated in Article III rule 6 of the Hague-Visby Rules, the cargo owners sought to commence arbitration against the shipowners and also sought an extension of time for so doing under section 27 of the Arbitration Act 1950, which empowers the court to extend the time for the commencement of arbitration when there is a contractual time bar, the enforcement of which would cause undue hardship.
>
> The Court of Appeal rejected the application on the basis that the time bar was not a contractual bar, but the result of the compulsory application of the Hague-Visby Rules as a matter of English law.

(*Kenya Railways v. Antares Co. Pte (The Antares (Nos. 1 and 2)*) [1987] 1 Lloyd's Rep. 424. See also the decision in this case under the consideration of Article III rule 6 of the Hague-Visby Rules.)

* * * *

APPENDIX F

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

June 5, 1997

LAURITZEN REEFERS

v.

OCEAN REEF TRANSPORT LTD. S.A. (THE "BUKHTA RUSSKAYA")

Before Mr. Justice THOMAS

Charter-party (Time)—Indemnity—Limitation of time—Hague-Visby Rules—Hague Rules—Incorporation—"General paramount clause" to apply—Damage to cargo—Charterers settled cargo interests' claims—Charterers claimed to be indemnified by owners—Whether Hague Rules or Hague-Visby Rules incorporated—Whether claim time barred—Whether application for extension of time should be granted.

By a charter-party on the Baltime form dated July 13, 1995 the defendant owners let their vessel *Bukhta Russkaya* to the plaintiff charterers for a time chartered trip to Far East ports with a cargo of frozen fish. The charter was governed by English law, provided for arbitration in London and further provided inter alia:

> . . . in trades involving neither US nor Canadian ports, the general paramount clause to apply in lieu of the USA clause paramount.

The vessel loaded frozen sea food in Mauritania and carried this cargo to Tokyo where discharge was completed on Oct. 4, 1995.

Three of the cargo interests claimed against the charterers and owners for damage to the cargo. Two claims were made in January and May, 1996 and were referred by the charterers and their P. & I. club to the owners who referred the claims to their P. & I. club. In August, 1996 the respective P. & I. clubs reached an understanding that the owners' P. & I. club would deal with the claims in the first instance. A third claim was presented to the owners and referred to their P. & I. club in September, 1996. It was dealt with initially on the same basis as the other two claims.

From the correspondence and on the evidence it appeared that the owners' P. & I. club became anxious that the charterers' P. & I. club should deal with all the claims. In the event in late October or early November, 1996 the charterers began to negotiate directly with the cargo interests in Japan and a settlement was reached in late November and December, 1996 for U.S. $226,000.

On Jan. 23, 1997 the charterers gave notice of arbitration claiming an indemnity from the owners in respect of the payments they had made to cargo interests, and issued an application under s. 27 for an extension of time and for a declaration that the claim was not time barred on Jan. 30, 1997.

The charterers argued that the Hague-Visby Rules were incorporated into the charter by the words 'general paramount clause" and the claim was not time barred since art. III, r. 6(bis) stated that an action for indemnity against a third person might be brought even after the expiry of the one year limitation period, if it was brought within the time allowed by the law of the Court seised of the case. This time must be at least three months from the date on which the claim was settled.

The owners argued that the Hague Rules (which contained no such provision for claims for indemnity) were incorporated; the one year limit applied and the claim was time barred.

————*Held*, by Q.B. (Com. Ct.) (THOMAS, J.), that (1) on the evidence it was clear that there was a clause in standard form that was known as "the general paramount clause"; the clauses described as "the general paramount clause" had the following essential terms: (a) if the Hague Rules were enacted in the country of shipment then they applied as enacted; (b) if the Hague Rules were not enacted in the country of shipment, the corresponding legislation of the country of destination applied or, if there was no such legislation the terms of the Convention containing the Hague Rules applied; and (c) if the Hague-Visby Rules were compulsorily applicable to the trade in question, then the legislation enacting these rules applied (*see* p. 746, col. 2);

(2) shipping men would have understood 'the general paramount clause" to have referred to a clause with the essential features; and applying the terms of that clause to the circumstances of this case it was clear on what was common ground as to the applicable legislation at the ports of shipment and destination that the Hague Rules applied (*see* p. 747, col. 1);

(3) the charterers' claims against the owners were time barred (*see* p. 747, col. 1);

(4) although it was understandable that the charters' P. & I. club might not have been concerned with the time bar when owners were dealing with the cargo interests' claims, they were plainly at fault when they failed to consider the question of the time bar before settling the claims with cargo interests; and the charterers failed to consult the owners on the settlements made with cargo interests and did not expressly at the time reserve over their rights against the owners; however neither of these matters caused any real prejudice to the owners (*see* p. 747, col. 2; p. 748, col. 1);

(5) the submission by the owners that the charterers settled claims for which they were in fact under no liabil-

ity to cargo interests since they had no contract with them, would be rejected; there was no evidence that showed that the Courts of Japan would give effect to the demise clause or apply English law (*see* p. 748, cols. 1 and 2);

(6) although it was a matter for regret and criticism of the charterers' P. & I. club that they did not keep the owners' P. & I. club properly informed of their intentions it was clear that the charterers' P. & I. club did intend to bring a claim for an indemnity against the owners (*see* p. 748, col. 2);

(7) taking all the factors into account particularly the length of delay, the amount at stake, the degree of fault on the part of the charterers' P. & I. club and the lack of prejudice, this was a proper case to extend time for appointing an arbitrator by the short period necessary to enable the claim for indemnity to be brought (*see* p. 748, col 2).

The following cases were referred to in the judgment: *Agios Lazaros*, The (C.A.) [1976] 2 Lloyd's Rep. 47; *Aspen Trader*, The (C.A.) [1981] 1 Lloyd's Rep. 273; *Stephanos*, The [1989] 1 Lloyd's Rep. 506.

This was on application by the plaintiff charterers, Lauritzen Reefers for an extension of time under s. 27 of the Arbitration Act, 1950 and for a declaration that their claim against the defendant owners Ocean Reef Transport Ltd. S.A. for an indemnity in respect of payments made to cargo interests for damage to cargo was not time barred.

M. Michael Coburn (instructed by Messrs. Holman Fenwick & Willan) for the plaintiffs; Miss. P. Melwani (instructed by Messrs. Rayfield Mills) for the defendants.

The further facts are stated in the judgment of Mr. Justice Thomas.

JUDGMENT

Mr. Justice THOMAS: By a charter-party on the Baltime form dated July 13, 1995 the defendants as respondent owners, ("the owners") chartered their refrigerated vessel, *Bukhta Russkaya* to the plaintiffs ('the charterers") for a time chartered trip to Far East ports with a cargo of frozen fish. The vessel loaded frozen sea food in Mauritania and carried this cargo to Tokyo where discharge was completed on Oct. 4, 1995. Three of the cargo interests claimed against the charterers and owners for damage to the cargo. The claims were settled by charterers for a total sum of about U.S. $226,000 in November and December, 1996.

The charter-party was governed by English law and provided for arbitration in London. It contained the following protective clauses:

> The following clauses are hereby deemed to be incorporated in this charterparty; new Jason clause.
>
> In trades between Canadian ports and ports other than US ports, the Canadian clause paramount to apply in lieu of the USA clause paramount, in trades involving neither US nor Canadian ports, the general paramount clause to apply in lieu of the USA clause paramount.

On Jan. 23, 1997 the charterers gave notice of arbitration in respect of their claim for an indemnity from the owners in respect for the payment they had made to cargo interests.

An issue has arisen as to whether that claim is time barred. It is the charterers' contention that the Hague-Visby Rules were incorporated into the charter by the words 'general paramount clause", and hence the claim is not time barred. They say art. III, r. 6 (bis) of the Hague-Visby Rules applies. That article provides that an action for indemnity against a third person may be brought even after expiry of the one year limitation period, if it is

brought within the time allowed by the law of the Courts seised of the case. This time must be at least three months from the date on which the claim was settled.

The owners, however, say that the Hague Rules (which contain no such provision for claims for indemnity) were incorporated; the one year limit applies and so the claim is time barred.

It is common gound that neither the Hague nor the Hague-Visby Rules were compulsorily applicable by the legislation of Japan or Mauritania. It is also common ground that as a matter of contract either the Hague or the Hague-Visby Rules applied. Neither party contended that the words in the clause to which I have referred were meaningless.

In 1976 it was decided by the Court of Appeal in *The Agios Lazaros*, [1976] 2 Lloyd's Rep. 47 that a clause which said 'also clause paramount are deemed to be incorporated into this charterparty" incorporated the Hague Rules and not the Hague-Visby Rules. In giving the leading judgment Lord Denning said:

> What does "paramount clause" or "clause paramount" mean to shipping men? Primarily it applies to bills of lading. In that context its meaning is, I think, clear beyond question. It means a clause by which the Hague Rules are incorporated into the contract evidenced by the bill of lading and which overrides any express exemption or condition that is inconsistent with it. As I said in *Anglo-Saxon Petroleum Co. v. Adamasto Shipping Co.*, [1957] 1 Lloyd's Rep. 271; [1957] 2 Q.B. 233 at pp. 277 and 266:
>
> > When a paramount clause is incorporated into a contract, the purpose is to give one Hague Rules contractual force; so that, although the bill of lading may contain very wide exceptions, the rules are paramount and make the ship

> owners liable for want of due diligence to make the ship seaworthy and so forth . . .

Such being the clear meaning of "clause paramount" in a bill of lading, we have to see what its meaning is in this charter-party. The answer is given by the decision of the House of Lords as *The Adamastos*, [1958] 1 Lloyd's Rep. 73; [1959] A.C. 133. It brings the Hague Rules into the charter-party so as to render the voyage, or voyages, subject to the Hague Rules, so far as applicable thereto; and it makes those rules prevail over any of the exceptions in the charter-party. The Judge, however, took a different view. He said there are many different paramount clauses and he could not say, which of them was applicable. So none of them was. He said of paramount clauses:

> Sometimes only the Article 4 exceptions are incorporated and sometimes the incorporation of the whole of the Hague Rules is subject to a limitation that they are only to be effective if compulsorily applicable by the law of the place of shipment.

I do not share the Judge's view. It seems to me that when the "paramount clause" is incorporated, without any words of qualification, it means that all the Hague Rules are incorporated. If the parties intend only to incorporate part of the rules (for example Art. IV), or only so far as compulsorily applicable, they say so. In due absence of any such qualification it seems to me that a 'clause paramount" is a clause which incorporates all the Hague Rules. I mean, of course, the accepted Hague Rules, not the Hague-Visby Rules, which are of later date.

In 1976 the Hague-Visby Rules had not been brought into force in the United Kingdom. They were brought into force by the Carriage of Goods by Sea Act, 1971 on

June 23, 1977. By the year 1995 the position was that a number of states had brought into force the Hague-Visby Rules. Some states continued to keep in force the Hague Rules and there were other states where there is no compulsory legislation at all. In those circumstances neither the owners nor the charterers contended that the charter-party incorporated the Hague Rules simpliciter.

Mr. Coburn, who apeared for the charterers, contended in a succinct but attractive argument that no specific clause was incorporated by the words "the general paramount clause"; instead, an overriding regime was incorporated into the charter-party, although the clause did not specify which. That overriding regime had to be ascertained from an examination of the charter-party; as the charter-party was governed by English law, the Hague-Visby was the relevant overriding regime. He also relied on a paragraph in Wilford Coghlin & Kimball on Time Charters at p. 561, which, after referring to the judgment in *The Agios Lazaros* stated:

> However, if a paramount clause is incorporated into a Baltime charter-party governed by English law it is likely, following the coming in to force in 1977 of the Carriage of Goods By Sea Act 1971, the Hague-Visby Rules would be regarded as incorporated.

In considering Mr. Coburn's argument, it is common ground that the first question that must be asked was that posed by Lord Denning in *The Agios Lazaros*; what did the words "the general paramount clause" mean to shipping men when the charter-party was entered into in July, 1995? If there was a specific clause to which the words referred, then that clause would be incoporated and the regime specified in the clause applied.

On the evidence before me it is clear that there is a clause in standard form that is known as "the general paramount clause". A typical clause is that which was promulgated by Bimco in 1994, it provides as follows:

(a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading dated Brussels 25th August 1924, as enacted in the country of shipment, shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable the terms of the said convention shall apply.

(b) *Trades where Hague-Visby Rules apply*: in trades where the International Brussels Convention 1924 as amended by the protocol signed at Brussels on February 23rd, 1968—the Hague-Visby Rules—apply compulsorily, the provisions of respective legislation shall apply to this Bill of Lading.

(c) The carrier shall in no case be responsible for loss of or damage to cargo howsoever arising prior to the loading into and after discharge from the Vessel or while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals.

There appear to be some very minor variations in the wording of several of the clauses that have been put before me. However each of the clauses described as "the general paramount clause" has the following essential terms: (1) if the Hague Rules are enacted in the country of shipment, then they apply as enacted; (2) if the Hague Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination applies or, if there is no such legislation, the terms of the Convention containing the Hague Rules apply; (3) if the Hague-Visby Rules are compulsorily applicable to the trade in question, then the legislation enacting those rules applies.

Standing behind each of the parties to this litigation are two very large P. & I. clubs. If there was evidence that

there were other clauses which are described as "the general paramount clause" in use in 1995, which did not have those essential terms that I have enumerated, I have little doubt that such evidence would have been adduced. That there is the uniformity in the essential features of the general paramount clause (which is shown on the evidence to have existed in 1995) is not at all surprising, given the way in which such clauses come into general use in the shipping industry.

Thus, on the evidence before me I am satisfied that shipping men would have understood "the general paramount clause" to have referred to a clause with the essential features which I have spelt out. Applying the terms of that clause to the circumstances of this case, it is clear on what is common ground as to the applicable legislation at the ports of shipment and destination, that the Hague Rules apply.

As I have reached the conclusion that there was a specific general paramount clause which was incorporated, it is not necessary to consider the charterers' argument that the overriding regime of the Hague-Visby Rules would have applied (in the absence of there being such a clause) on the basis that the charter-party was governed by English law. That point does not arise and it is not apposite for me to deal with Mr. Coburn's argument.

As it follows that the charterers' claims against the owners is time barred, it is necessary to consider the charterers' application under s. 27 of the Arbitration Act, 1950 which applies to this application.

The principles that are applicable are set out in the judgment of Lord Justice Brandon in *The Aspen Trader*, [1981] 1 Lloyd's Rep. 273, and particularly at p. 279.

It is not necessary to set out the details of what happened. Two claims were made in January and May, 1996 by cargo interests against the charterers. These were re-

ferred by charterers and their P. & I. club to the owners. They referred the claims to their P. & I. club. In August, 1996 the respective P. & I. clubs reached an understanding, because the bills of lading contained a demise clause and were governed by English law, that the owners' P. & I. club would, at the charterers' insistence, deal with the claims in the first instance; they would then seek an indemnity from the charterers if appropriate. The owners also requested that charterers provide security.

A third claim was presented to owners and referred to their P. & I. club in September, 1996; it was dealt with initially on the same basis as the other two claims. Prior to the expiry of the one-year time bar provided for by the bills of lading, owners and charterers granted extensions of time to cargo interests.

It appears from the correspondence and the evidence before me that the owners' P. & I. club became anxious that the charterers' P. & I. club should deal with all the claims. They considered liability rested ultimately upon the charterers. Their attitude became firmer when the security they requested was not forthcoming. It appears that some time in late October or early November, 1996 that the charters began to negotiate with the cargo interests directly in Japan. They reached settlements with cargo interests in late November and December, 1996. The evidence of the charterers' P. & I. club was:

> In the meantime the combination of the pressure from [owners' P. & I. club] and the perception that relatively cheap settlements could be achieved by [charterers] in Japan was inclining the [charterers] to be the ones to settle the claims in the first instance.

The charterers said they acted as they did because they could settle the claims in Japan and believed that they could do so on very favourable terms.

Soon after the settlements had been made, the charterers' P. & I. club instructed solicitors to bring a claim

against the owners for an indemnity under the charter-party. Those solicitors immediately appreciated there might be difficulty over whether the claim for an indemnity was time barred. Accordingly, as I have said, they gave notice of arbitration on Jan. 23, 1997 and issued the application both under s. 27 and for a declaration that the claim was not time barred on Jan. 30, 1997.

The sum involved in this case is in the order of some U.S. $226,000; that is not an insubstantial amount. The delay after the claim became time barred and before notice of arbitration was given was some three and a half months; this was a period felicitously described by Miss Melwani, who appeared for the owners, as "not particularly lengthy".

The charterers say that it was understandable that at the time of the expiry of the time bar in October, 1996, the charterers' P. & I. club did not have in mind the time bar as it was envisaged that the claims would be brought against the owners and indemnity sought against the charterers. However, when the charterers' P. & I. club themselves started direct negotiations and settled the claim, it was the charterers' evidence that it never occurred to the person dealing with it that there was a time bar.

Although I accept that it was readily understandable that the charterers' P. & I. club might not have been concerned with the time bar when owners were dealing with the cargo interests' claims, they were, in my judgment, plainly at fault, as is candidly accepted by them, when they failed to consider the question of time bar before settling the claims with cargo interests. Nonetheless, although they were at fault, over a point that was quite clearly elementary to a P. & I. club, I must bear in mind the question of prejudice to owners. This is a factor in these applications that is of considerable importance. The only prejudice to which the owners can point is slight. It is this. They were not consulted on the settlements made

with cargo interests by charterers and the charterers did not expressly at the time reserve over their rights against the owners.

However, in my judgment neither of these matters caused any real prejudice to the owners. As the question of whether the settlement was a reasonable one is a point that can be raised in the arbitration, the fact that the owners were not told of a claim for indemnity for about a month can not, in the circumstances of this case, have caused the owners any prejudice at all.

The owners also say that I should take into account two further matters: first, they say that the charterers settled claims for which they were in fact under no liability to cargo interests since they had no contract with them. They say this was the position because the bills of lading, although on charterers' form, were governed by English law and contain a demise clause. However, there is no evidence before me that shows the Courts of Japan (or other countries where a claim might be brought against the well known charterers concerned in this case) would give effect to the demise clause or apply English law. It is a well known fact that several jurisdictions do not do so.

In any event, as Mr. Justice Saville pointed out in *The Stephanos*, [1989] 1 Lloyd's Rep. 506, the more the hopelessness of the charterers' claim is asserted, the less could the owners be said to be prejudiced by the charterers being allowed to advance it.

Secondly, the owners say that by the time the charterers settled with cargo they had in fact no interest in pursuing indemnity against the owners and therefore would suffer no hardship if this claim for an indemnity was time barred. Although it is a matter for regret and criticism of the charterers' P. & I. club that they did not keep owners' P. & I. club properly informed of their intentions, as one would ordinarily expect between these two leading P. & I.

clubs, it is quite clear that charterers' P. & I. club did intend to bring a claim as the only purpose in going to the solicitors in January, 1997 was to bring such a claim.

Taking all these factors into account, particularly the length of the delay, the amount at stake, the degree of fault on the part of the charterers' P. & I. club and the lack of prejudice; I am satisfied that this is a proper case to exercise my discretion to extend the time for appointing an arbitrator by the short period necessary to enable the claim for indemnity to be brought.

Supreme Court, U.S.
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No. 98-204

In The

Supreme Court of the United States

October Term, 1997

MAMMOET SHIPPING, *et al.*,

Petitioners,

vs.

SKY SHIPPING LTD and
ITEL CONTAINER CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ITEL CONTAINER CORPORATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review a decision of the Eleventh Circuit Court of Appeals which was based upon interpretation of a particular maritime contract of carriage choice of law provisions and where there was no conflict between the circuits and where the decision had no overall effect upon the maritime industry.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Itel Container Corporation, has no parent company and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Itel Container Corporation ("Itel") is not listed as a Respondent in Petitioner Mammoet Shipping B.V., et al.'s (Mammoet) Petition for Writ of Certiorari. However, pursuant to United States Supreme Court Rule 12(6), Itel is to be considered as a Respondent.

Petitioner Mammoet's direct claim in this Court is against Respondent Sky Shipping Ltd. Reversing the United States District Court, the Eleventh Circuit found in favor of Respondent Sky Shipping Ltd. appeal against Petitioner Mammoet. The Eleventh Circuit Court of Appeals affirmed the United States District Court's judgment in favor of Respondent Itel against Respondent Sky Shipping Ltd. Sky Shipping Ltd. did not file a Petition for Writ of Certiorari against Respondent Itel.

Itel brought this maritime cargo damage/loss action against Petitioner Sky Shipping, Ltd., f/k/a Candyline, a non-vessel operating common carrier (NVOCC) and against Petitioner Mammoet Shipping BV, et al, the owner/operator of the M/V TITAN SCAN. The action involved loss/damage to new refrigerated ocean containers, purchased by Itel and being transported on Petitioner's vessel from Japan to Savannah, Georgia.

Having purchased 198 refrigerated containers from Japan, Respondent Itel contracted with representatives of Petitioner Candyline in London for transportation of the containers from Japan to Savannah, Georgia. Personal negotiations and execution of the contract of carriage between Itel and Candyline's representatives occurred in London, the sole place of doing business of Respondent Candyline.

As the Eleventh Circuit Court of Appeals noted, the terms and condition of the Itel-Candyline contract were set forth in a Conline Booking Note (Opinion, p. 2). In addition to standard boilerplate terms, the Conline Booking Note contained an addendum. Clause 10 of the addendum stated as follows: "English law to apply."

The subsequent ocean Bill of Lading prepared by Candyline's agent in Japan incorporated by reference the Conline Booking Note which had been negotiated, prepared and executed in London. The relevant Bill of Lading language stated as follows: "Terms and conditions as per Conline Booking Note dated 30th August 1990" (R.2-46-5, 6 at ¶ 24). The Bill of Lading contained a General Paramount Clause. Additionally, Clause 3 contained a forum selection and choice of law Clause — the country where the carrier had its principal place of business, i.e., England. As the parties stated to the Eleventh Circuit at oral argument, the parties waived the choice of forum provisions and proceeded to trial in the United States District Court, Southern District of Georgia.

After executing the Itel contract in London, Respondent Candyline, as a NVOCC, executed a separate contract of carriage with Petitioner Mammoet. Candyline and Mammoet executed a Conline Booking Note containing terms similar to those in the Itel-Candyline Booking Note.

Following the loss/damage to its containers, Itel brought this action. Respondent Candyline filed a cross-claim for indemnity against Respondent Mammoet, the actual operator of the M/V TITAN SCAN. Construing the provisions of the respective contracts of carriage, the District Court held that English substantive law applied to the Itel-Candyline dispute. Accordingly, the District Court held that England's Hague-Visby Rules applied. These rules, thus, governed Candyline's

liability to Itel. On the contrary, Candyline had asserted that the Japanese Carriage of Goods by Sea Act were applicable to the Itel-Candyline dispute. Finding that Candyline was entitled to indemnity from Mammoet, the District Court held that United States Carriage of Goods By Sea Act applied in that contractual claim.

On appeal, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court on the Itel-Candyline contract, i.e., that England's Hague-Visby Rules applied. However, reversing the District Court's opinion on the Candyline-Mammoet Contract of Carriage, the Eleventh Circuit held that the Hague-Visby rules applied. On remand, the District Court modified its previous judgment in the Candyline-Mammoet indemnity action to reflect application of the Hague-Visby Rules.

SUMMARY OF THE ARGUMENT

In its decision, the Eleventh Circuit Court of Appeals reviewed the District Court's interpretation of choice of law provisions contained in the Itel-Candyline and in the Candyline-Mammoet contracts of carriage. Thus, the opinion was based on concepts of contract construction.

In support of its opinion, the court referred to several somewhat analogous district court opinions. Moreover, the Eleventh Circuit's decision did not involve resolution of any constitutional issues; nor did it involve matters of broad national application. Moreover, in resolving issues of maritime contract law, the Eleventh Circuit decision did not create a conflict between the Eleventh Circuit and other circuit courts of appeal. In point of fact, there is no other similar circuit court of appeal decisions on the issues, i.e., interpretation of choice of law provisions in these ocean contracts of carriage.

Inasmuch as the substance of the Petition did not encompass any of the designated considerations governing Review On Certiorari enunciated in Supreme Court Rule 10, the Petition should not be considered.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE DECIDED BY THE ELEVENTH CIRCUIT COURT OF APPEALS IN CONSTRUING A PROVISION IN A MARITIME CONTRACT OF CARRIAGE DOES NOT MEET THIS COURT'S REQUIREMENTS FOR CONSIDERATION OF A PETITION FOR CERTIORARI.

A. The Eleventh Circuit Court Of Appeals Decision Does Not Conflict Either With Another United States Court Of Appeals Decisions, Or With A Decision Of A State Court Of Last Resort. Thus, Petitioners Have Failed To Meet The Requirements Of Supreme Court Rule 10(a).

Construing the provisions contained in the Petitioners' back to back contracts of carriage, the Eleventh Circuit held that England's Hague-Visby Rules governed the rights of the respective parties to the two contracts of carriage. Accordingly, the Hague-Visby Limitation of Liability provisions controlled the respective carriers' liability. As reference for its opinion, the Eleventh Circuit referred to various district court opinions, e.g., *Insurance Co. of N. Am. v. s/s SEALAND DEVELOPMENT*, 1990 AMC 2967, 2970 (S.D. N.Y. 1989) (proposition that specific clauses of a contract pre-empt form provisions). In the Itel-Candyline Conline Booking Note, the Eleventh Circuit gave priority to the specific clause which dictated application of English substantive law. Moreover, other portions of the opinion centered on general principles of contract construction,

i.e., whether the parties intended for the Hague-Visby Rules to apply.

Notably, the Eleventh Circuit decision did not create a conflict with any other federal circuit court of appeals decision. For these reasons, Petitioners have failed to meet the requirement of United States Supreme Court Rule 10(a).

B. The Eleventh Circuit Court Of Appeals Decision Does Not Involve Any Important, Unsettled Question Of Federal Law.

To reiterate, the Eleventh Circuit's opinion centered around traditional principles of contract construction. Construing various provisions of the contracts of carriage (Conline Booking Note) and the Bill of Lading, the court found that England's Hague-Visby rules governed the rights of the contracting parties.

As the authors of Moore's Federal Practice have observed, "The importance of an issue is not necessarily measured by its impact on the litigants but its contribution to the development of national law." § 510.41[3]. The authors further noted that increasingly this Court has shaped its caseload toward constitutional issues, e.g., *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 119 L. Ed. 2d 121 (1992) (involving an interpretation of the Commerce clause as applied to hazardous waste disposal fee). In matters not involving constitutional issues, this Court has granted Certiorari where uniformity of a federal law is at issue, e.g., *Ernst & Ernst v. Mochfelder*, 425 U.S. 185, 193 (1976) (whether a private cause of action under 10(b)(5) exists).

As stated previously, the case involves neither a constitutional issue nor a general issue of uniformity. Rather,

the issue was simply one of contract construction, i.e., construction of the particular language in two related contracts of carriage. Accordingly, the decision is not of such great importance that its effect will be widespread on the maritime industry. For these reasons, the Petition does not meet the requirements of the United States Supreme Court Rule 10(c).

CONCLUSION

Based on the foregoing, Respondent respectfully submits that this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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